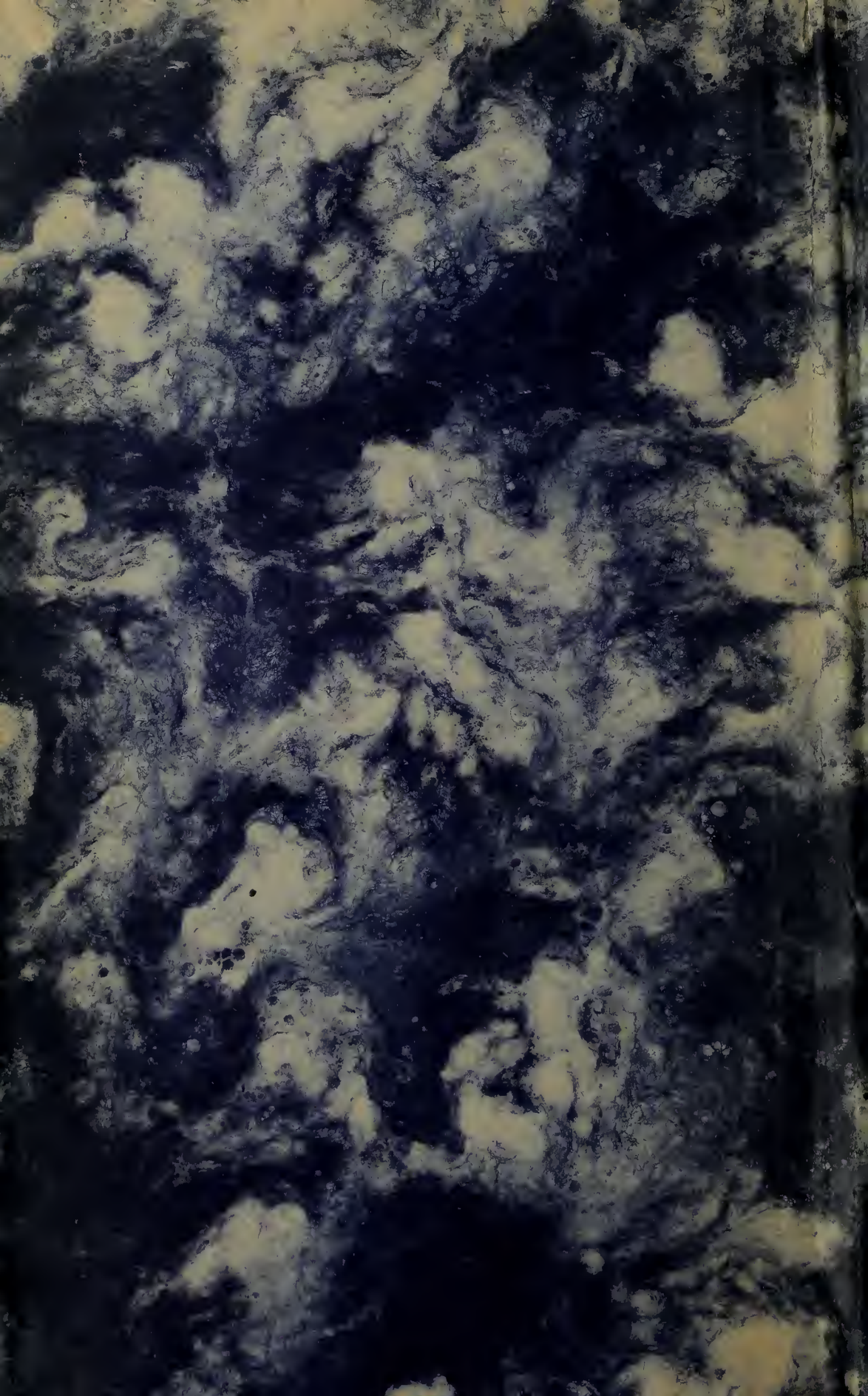
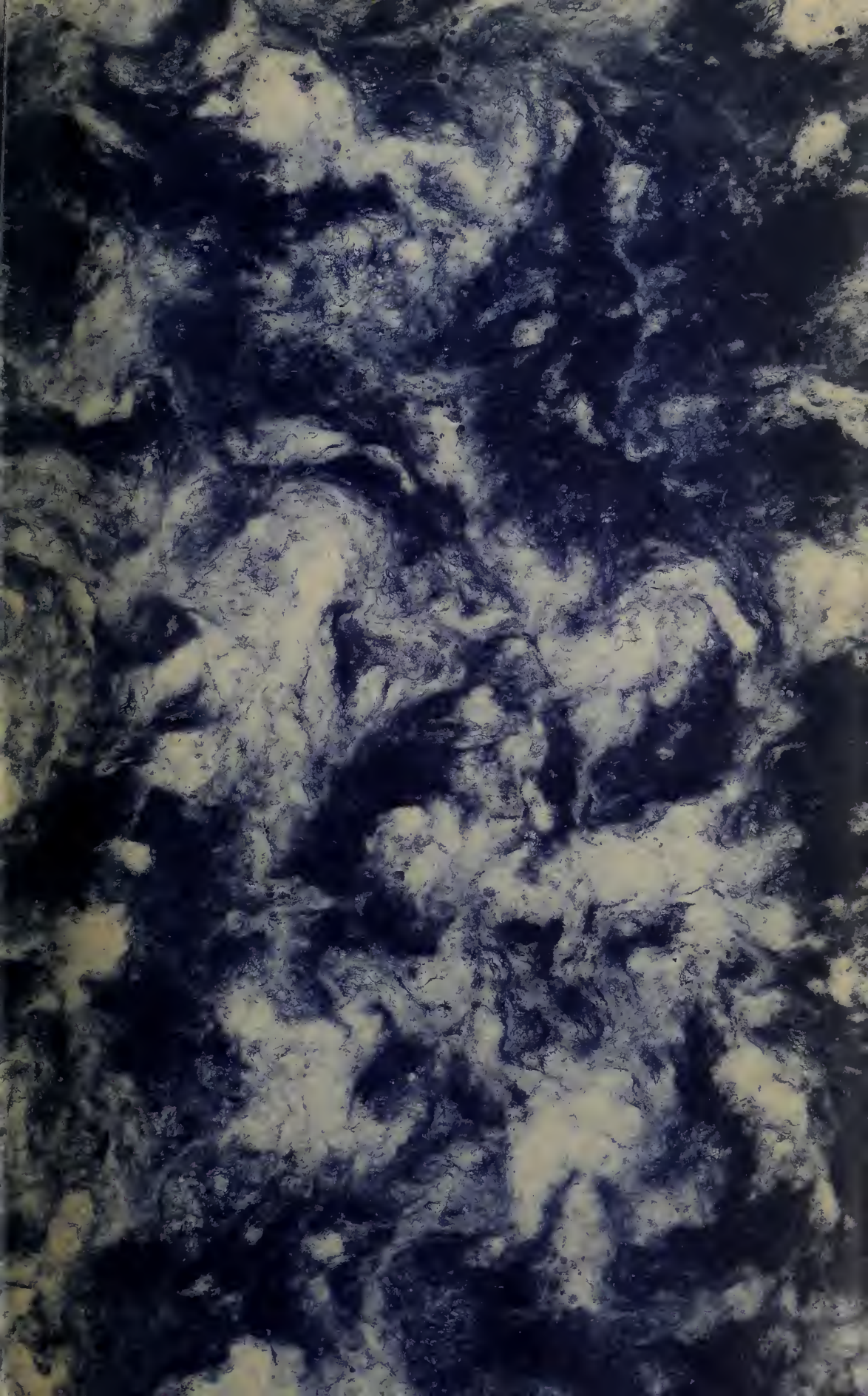

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THE
LAWS OF ENGLAND.

VOLUME VII.

THE

LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND.

BY

THE RIGHT HONOURABLE THE

EARL OF HALSBURY

LORD HIGH CHANCELLOR OF GREAT BRITAIN,
1885-86, 1886-92, and 1895—1905,

AND OTHER LAWYERS.

VOLUME VII.

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(Part VI. to End).

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BARRISTERS-AT-LAW.

The Titles in this Volume have been contributed by the following gentlemen:—

TITLE.	CONTRIBUTED BY
CONSTITUTIONAL LAW (PARTS VI. and VII.).	W. S. HOLDSWORTH, Esq., M.A., D.C.L., Fellow and Lecturer in Law of St. John's College, Oxford; Lecturer in Law at Wadham, Hertford, and Lincoln Colleges, Oxford; late Professor of Constitutional Law, University College, London; E. WAVELL RIDGES, Esq.; MERYON WHITE-WINTON, Esq., M.A.; and ALFRED HILDESHEIMER, Esq., M.A., Barristers-at-Law.
CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL.	J. C. FOX, Esq., a Master of the Supreme Court (Chancery Division).
CONTRACT . .	HERBERT F. MANISTY, Esq., K.C., Recorder of Berwick-upon-Tweed, and Solicitor-General of the County Palatine of Durham; J. A. JOHNSTON, Esq., B.A.; ARTHUR ROBINSON, Esq., B.A.; WILLIAM BOWSTEAD, Esq.; M. R. EMANUEL, Esq., M.A., B.C.L.; Barristers-at-Law.

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† For the capacity or otherwise of certain persons and bodies to enter into contracts, see the particular title—*e.g.*, COMPANIES; CORPORATIONS; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; INFANTS AND CHILDREN; LUNATICS AND PERSONS OF UNSOUND MIND; PARTNERSHIP.

‡ The subjects of Fraud, Misrepresentation, and Mistake, as affecting the consent of a party to a contract, are separately treated under titles MISREPRESENTATION AND FRAUD; MISTAKE.

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For Actions on Contracts - - - *See title* ACTION.
Agency Contracts - - - ,, AGENCY.
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Aliens, Contracts with - - - ,, ALIENS.

For Auction, Sale by	*See title*	AUCTION AND AUCTIONEERS.
Avoidance of Contract	,,	MISREPRESENTATION AND FRAUD; MISTAKE.
Bailment, Contracts of	,,	BAILMENT; CARRIERS; INNS AND INNKEEPERS; PAWNBROKERS AND PLEDGES; ETC.
Banking	,,	BANKERS AND BANKING.
Bills of Sale	,,	BILLS OF SALE.
Bonds	,,	BONDS.
Building Contracts	,,	BUILDING CONTRACTS ENGINEERS, AND ARCHITECTS.
Champertous Contracts	,,	ACTION.
Companies, Contracts by	,,	COMPANIES.
Contract of Carriage	,,	CARRIERS; SHIPPING AND NAVIGATION.
Contracts made by Agents	,,	AGENCY.
Corporations, Contracts by	,,	CORPORATIONS; PUBLIC AUTHORITIES.
Crown, Contracts with	,,	ACTION; CONSTITUTIONAL LAW.
Damages	,,	DAMAGES.
Executors and Administrators	,,	EXECUTORS AND ADMINISTRATORS
Fraud	,,	MISREPRESENTATION AND FRAUD.
Gaming Contracts	,,	GAMING AND WAGERING.
Goods, Sale of	,,	SALE OF GOODS.
Guarantee	,,	GUARANTEE.
Indemnity	,,	GUARANTEE.
Infants, Contracts with	,,	INFANTS AND CHILDREN.
Insurance, Contracts of	,,	INSURANCE.
Land, Contracts Relating to	,,	COMPULSORY PURCHASE OF LAND AND COMPENSATION; LANDLORD AND TENANT; SALE OF LAND.
Loans	,,	MONEY AND MONEY LENDING.
Lunatics	,,	LUNATICS AND PERSONS OF UNSOUND MIND.
Maintenance	,,	ACTION.
Marriage, Promise of	,,	HUSBAND AND WIFE.
Married Women, Contracts with	,,	HUSBAND AND WIFE.
Measure of Damages	,,	DAMAGES.
Misrepresentation	,,	MISREPRESENTATION AND FRAUD.
Mistake	,,	MISTAKE.
Necessaries	,,	ADMIRALTY; HUSBAND AND WIFE; INFANTS AND CHILDREN.
Negotiable Instruments	,,	BANKERS AND BANKING; BILLS OF EXCHANGE; ETC.
Partners, Contracts of	,,	PARTNERSHIP.
Ratification	,,	AGENCY.
Remedies for Breach of Contract	,,	ACTION; DAMAGES; INJUNCTION; SPECIFIC PERFORMANCE.
Restraint of Trade, Contracts in	,,	TRADE AND TRADE UNIONS.
Service Contracts	,,	MASTER AND SERVANT.
Specific Performance	,,	SPECIFIC PERFORMANCE.
Stocks and Shares	,,	GAMING AND WAGERING; STOCK EXCHANGE.
Sureties	,,	GUARANTEE.
Ultra Vires	,,	COMPANIES; CORPORATIONS.
Unconscionable Bargains	,,	FRAUDULENT AND VOIDABLE CONVEYANCES; MONEY AND MONEY LENDING.

For Warranties - - - - - *See title* ANIMALS; SALE OF GOODS.
Warranty of Authority - - ,, AGENCY.
Work Done - - - - - ,, WORK AND LABOUR.

As to other contracts relating to particular subjects, *see titles passim*.

CONTRACTOR.

See BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS.

CONTRACTOR, DEFENCE OF INDEPENDENT.

See BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS; MASTER AND SERVANT.

CONTRIBUTION.

See COMPANIES; CONTRACT; DESCENT AND DISTRIBUTION; GUARANTEE; MORTGAGE; PARTNERSHIP; SHIPPING AND NAVIGATION.

CONTRIBUTORY.

See COMPANIES.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONTUMACY.

See ECCLESIASTICAL LAW.

CONVERSION.

See TROVER AND CONVERSION.

CONVERSION AND RECONVERSION IN EQUITY.

See TRUSTS AND TRUSTEES.

CONVEYANCER.

See BARRISTERS.

CONVEYANCES.

See BILLS OF SALE; DEEDS AND OTHER INSTRUMENTS; FRAUDULENT AND VOIDABLE CONVEYANCES; REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

CONVEYANCES, PUBLIC.

See STREET TRAFFIC.

CONVICTION.

See CRIMINAL LAW AND PROCEDURE.

CONVICT'S PROPERTY.

See CRIMINAL LAW AND PROCEDURE.

CONVOCATION.

See CONSTITUTIONAL LAW; ECCLESIASTICAL LAW.

CONVOY.

See SHIPPING AND NAVIGATION.

CO-OWNERSHIP.

See PARTITION; PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL.

COPARCENER.

See REAL PROPERTY AND CHATTELS REAL.

ABBREVIATIONS

USED IN THIS WORK.

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.* [1891] A. C.)
A.-G.	Attorney-General
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1811
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831—1842
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826
Adv.-Gen.	Advocate-General
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783
And.	Anderson's Reports, Common Pleas, fol., 1 vol., 1535—1605
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870
Bac. Abr.	Bacon's Abridgment
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814

Bankr. & Ins. R. ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855
Bar. & Arn.	Barron & Arnold's Election Cases, 1 vol., 1843—1846
Bar. & Aust.	Barron & Austin's Election Cases, 1 vol., 1842
Barn. (CH.)	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741
Barn. (K. B.)	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866
Beav. & Wal. .. .	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846
Beaw.	Beawes's Lex Mercatoria
Bellewe	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860
Bell, Ct. of Sess. ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792
Bell, Ct. of Sess. fol. ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795
Bell, Dict. Dec. ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834
Bing. (N. C.)	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876
Bitt. Rep. in Ch. ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884
Bl. Com...	Blackstone's Commentaries
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821
Bli. (N. S.)	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804
Bos. & P. (N. R.) ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807
Bract.	Bracton De Legibus et Consuetudinibus Angliæ
Bro. Abr.	Sir J. Brooke's Abridgment
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872
Bro. (N. C.)	Sir R. Brooke's New Cases, 1 vol., 1515—1558
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800
Bro. Supp. to Mor. ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827

Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822
Brod. & F.	Brodrick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845
Brown. & Lush. ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840
C. A.	Court of Appeal
C. B.	Common Bench Reports, 18 vols., 1845—1856
C. B. (N. S.)	Common Bench Reports, New Series, 20 vols., 1856—1865
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)
C. L. R.	Common Law Reports, 3 vols., 1853—1855
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols. 1823—1841
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885
Cald. Mag. Cas. ..	Caldecott's Magistrates Cases, 1 vol., 1777—1786
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1815—1853
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1843
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700
Cary	Cary's Reports, Chancery, 1 vol.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697
Cas. Pract. K. B. ..	Cases of Practice, King's Bench, 1 vol., 1655—1775
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1689—1727
Cas. *temp.* Finch ..	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680
Cas. *temp.* King ..	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733
Cas. *temp.* Talb... ..	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737
Ch. (preceded by date) ..	Law Reports, Chancery Division, since 1890 (*e.g.* [1891] 1 Ch.)
Ch. App...	Law Reports, Chancery Appeals, 10 vols., 1865—1875
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890

Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808
Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876
Char. Cham. Cas.	Charley's Chamber Cases, 1 vol., 1875—1876
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846
Clay.	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833
Co. Ent.	Coke's Entries
Co. Inst.	Coke's Institutes
Co. Litt.	Coke on Littleton (1 Inst.)
Co. Rep.	Coke's Reports, 13 parts, 1572—1616
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846
Coll. Jurid.	Collectanea Juridica, 2 vols.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740
Com. Cas.	Commercial Cases, 1895—(current)
Com. Dig.	Comyns' Digest
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742
Coop. G.	G. Cooper's Reports, Chancery, 1 vol., 1792—1815
Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838
Coop. *temp.* Brough.	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834
Coop. *temp.* Cott.	C. P. Cooper's Cases *temp.* Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)
Corb. & D.	Corbett and Daniell's Election Cases, 1 vol., 1819
Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885
Cowp.	Cowper's Reports, King's Bench, 2 vols., 1774—1778
Cox, C. C.	E. W. Cox's Criminal Law Cases, 1843—(current)
Cox & Atk.	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846
Cox, Eq. Cas.	S. C. Cox's Equity Cases, 2 vols., 1745—1797
Cox, M. & H.	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, Vol. I., 1846—1852
Cr. & J.	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832
Cr. & M.	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835
Cr. & Ph.	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841
Craw. & D.	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846

Craw. & D. Abr. C. ..	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838
Cress. Insolv. Cas. ..	Cresswell's Insolvency Cases, 1 vol., 1827—1829
Cripps' Church Cas. ..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850
Cro. Car.	Croke's Reports *temp.* Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641
Cro. Eliz.	Croke's Reports *temp.* Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603
Cro. Jac.	Croke's Reports *temp.* James I., King's Bench and Common Pleas, 1 vol., 1603—1625
Cru. Dig.	Cruise's Digest of the Law of Real Property, 7 vols.
Cunn.	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735
Curt.	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844
Dalr.	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720
Dan.	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823
Dan. & Ll. . ..	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816
Dav. Ir.	Davys' (or Davies' or Davy's) Reports (Ireland), 1 vol., 1604—1611
Day	Day's Election Cases, 1 vol., 1892—1893
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857
Deac.	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835
Dears. & B.	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858
Dears. C. C.	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832
De G.	De Gex's Reports, Bankruptcy, 1 vol., 1844—1848
De G. F. & J.	De Gex, Fisher, and Jones's Reports, Chancery, 4 vols., 1859—1862
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859
De G. J. & Sm.	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865
De G. M. & G.	De Gex, Macnaghten, and Gordon's Reports, Chancery, 8 vols., 1851—1857
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835
Den.	Denison's Crown Cases Reserved, 2 vols., 1844—1852
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798
Dig.	Justinian's Digest or Pandects
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822
Donnelly	Donnelly's Reports, Chancery, 1 vol., 1836—1837
Doug. El. Cas.	Douglas' Election Cases, 4 vols., 1774—1776
Doug. (K. B.)	Douglas' Reports, King's Bench, 4 vols., 1778—1785
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818
Dow & Cl.	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832
Dow. & L.	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849

Dow. & Ry. (K. B.) ..	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827
Dow. & Ry. (M. C.) ..	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827
Dow. & Ry. (N. P.) ..	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841
Dowl. (N. S.)	Dowling's Practice Reports, New Series, 2 vols., 1841—1843
Dr. & Wal.	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841
Dr. & War.	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859
Drew. & Sm.	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865
Drinkwater	Drinkwater's Reports, Common Pleas, 1 vol., 1839
Drury *temp.* Nap. ..	Drury's Reports *temp.* Napier, Chancery (Ireland), 1 vol., 1858—1859
Drury *temp.* Sug. ..	Drury's Reports *temp.* Sugden, Chancery (Ireland), 1 vol., 1841—1844
Dugd. Orig.	Dugdale's Origines Juridiciales
Dunl. (Ct. of Sess.) ..	Dunlop, Court of Session Cases (Scotland), 2nd series, 24 vols., 1838—1862
Dunning..	Dunning's Reports, King's Bench, 1 vol., 1753—1754
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858
E. & E.	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861
E. B. & E.	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1223—1825
East	East's Reports, King's Bench, 16 vols., 1800—1812
East, P. C.	East's Pleas of the Crown
Ecc. & Ad.	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855
Eden	Eden's Reports, Chancery, 2 vols., 1757—1766
Edgar	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725
Edw.	Edwards' Reports, Admiralty, 1 vol., 1808—1812
Elchies	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754
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Part VI.—The Crown and the Executive.

SECT. 1.—*In General.*

SUB-SECT. 1.—*Delegation of the Executive Powers of the Crown.*

The Government.

1. The exercise of the executive powers vested in the Sovereign (*a*) is delegated in practice to the various political officers who compose the ministry or Government, certain of whom are the heads of the principal Government offices or departments of state, and to Government offices having no political heads, and whose staff is composed of permanent members of the Civil Service. The members of the ministry are appointed by the Crown, upon the nomination of the Prime Minister or Premier (*b*).

The Cabinet.

The general policy of the executive Government in matters such as declarations of peace and war, treaties, the government of the colonies and dependencies, and all important questions (*c*), as also the general scope and character of the legislation to be initiated by the party in power, is determined by the smaller group of ministers known as the Cabinet (*d*), whose functions as a body are purely consultative and advisory, and whose advice in executive matters the Sovereign must, generally, accept (*e*).

(*a*) See Vol. VI., p. 375.

(*b*) As to the ministry generally, see pp. 34 *et seq.*, *post*.

(*c*) As to the power of deciding what matters become Cabinet questions, see p. 44, *post*.

(*d*) As to the composition, functions, and origin of this body, see pp. 41 *et seq.*, *post*.

(*e*) As to the power of the Crown to reject the advice of the Cabinet, see note (*n*), p. 7, *post*.

SECT. 1. In General.

Details of the executive administration and the ordinary routine work of the executive are left to the various Government offices and departments (*f*), supervised and controlled, in the case of such of them as are political departments (*g*), by individual ministers.

Councils of the Crown.

2. Other titular councils of the Crown are Parliament itself (*h*), the peers, either collectively or individually (*i*), the judges, in matters of law (*k*), and the Privy Council, whose functions are now, however, purely executive, except where it acts in the form of committees (*l*).

Conventional usages.

3. The rules relating to the choice and appointment of the ministry and the Cabinet, and those which govern the relations of the latter with the Crown, the Prime Minister, and Parliament, depend upon conventional usages which have come to be regarded as constitutional necessities; but though necessary to be observed in order to ensure the harmonious co-operation of the Legislature

(*f*) As to the departments of state, see pp. 79 *et seq.*, *post*.

(*g*) Namely, the departments whose heads retire from office upon a change of ministry.

(*h*) The existence of the Cabinet as a council of the Crown was entirely ignored by Blackstone and the earlier commentators. Parliament is the titular council of the Crown in legislative matters, and all laws are still enacted in the name of the Sovereign, by and with the advice and consent of Parliament (see Vol. VI., p. 388). The Houses of Parliament also exercise advisory functions, by means of an address to the Crown, as to the dismissal of officers holding office during good behaviour (see p. 22, *post*); and the House of Commons has on some occasions addressed the Crown as to the appointment of a ministry (see p. 35, *post*).

(*i*) Instances of consultations by the Crown with the peers collectively have not occurred in modern times, and the functions of the House of Lords in this respect have long remained dormant. Blackstone gives instances of writs issued to the peers by Charles I. in 1640, and of the consultations with the peers held by James II. before his abdication and by the Prince of Orange prior to his acceptance of the crown (1 Bl. Com., 14th ed., 228). An earlier instance occurs in the reign of Henry IV., when the peers were made the advisory council with regard to exchanges of land by the Crown (see 2 Co. Inst. 110). The right of individual access to the Sovereign still exists, and may be exercised at any time (see title PARLIAMENT). The fact that the Hugh Spencers, father and son, who obtained ascendency over Edward II., denied the right of access to the Sovereign, except in their presence, and with regard to such matters as they thought fit, was one of the grounds for their impeachment and banishment (see 1 Bl. Com., 14th ed., 229; 4 Co. Inst. 53).

(*k*) On the meeting of a new Parliament writs are issued by the Crown Office to all the judges of the Supreme Court (except such of them as hold ordinary peerages, who receive writs of summons to the House of Lords in the usual form; see title PARLIAMENT), and to the Attorney and Solicitor General, "to attend with us and the rest of our council to treat and give your advice." The King's ancient serjeant is also so summoned when there is an occupant of that office, which is now never the case. As to the degree of Serjeant-at-Law, see title BARRISTERS, Vol. II., p. 358. Members of the Privy Council may also, it seems, be so summoned (see Parliamentary Paper, No. 212 of 1901; Lords' Standing Orders, Nos. 6, 7; and title PARLIAMENT).

(*l*) The Privy Council was originally the principal advisory council of the Crown, and the Cabinet was in its inception, and is still in some sense, a committee of that body, which was found too large and cumbersome for practical purposes (see note (*m*), p. 41, *post*). As to the composition and present functions of the Privy Council, see p. 51, *post*.

and the Executive, they do not form substantive law recognised and enforced by the courts (*m*).

Position of the Sovereign.

4. The personal functions of the Sovereign in the actual administration of the executive are now restricted principally to attaching his signature to the various executive documents, the nature and general policy of which have been previously determined by individual ministers or the Cabinet (*n*). Nominally he may

(*m*) As to the legal non-existence of the Prime Minister and the Cabinet, see note (*h*), p. 6, *ante*, and note (*m*), p. 41, *post*. Conventional usage depends for its sanction, or the authority which enforces its observance, upon the power of Parliament to obstruct the machinery of government by refusing to grant supplies, or to pass the necessary annual Acts, thus rendering the conduct of the executive government impossible without contravention of substantive law. The conventional rules and doctrines as at present accepted are the result of a gradual process of evolution since the revolution of 1688. They are directed principally to bringing the conduct of the executive under the control of Parliament and fixing responsibility for every executive act of the Sovereign (whose person, being inviolable, cannot be made responsible, see p. 373, *ante*), either upon the Cabinet as a whole, or upon individual ministers, thus ensuring the expenditure of the public money conformably to the wishes of Parliament. The evolution of the present doctrines relating to the Cabinet falls into three main periods: (1) the formation and ultimate recognition by Parliament of the smaller group of ministers, or committee of the Privy Council, known successively under the names of the Junto, Cabal, and Cabinet (see note (*m*), p. 41, *post*), to form the principal advisory council, chosen arbitrarily by the Crown, and meeting informally, under the immediate presidency and control of the Sovereign, during the period from 1688 to the reign of George I.; (2) the disappearance of the Sovereign from meetings of the council under George I. and the succeeding Hanoverian kings, and the consequent ascendency of the Prime Minister and complete ministerial responsibility to Parliament; (3) the entire dependence of the executive upon the parliamentary majority subsequently to the Reform Act of 1832, and the consequent necessity for the choice of ministers from amongst the party possessing a majority. The main features of these periods are given in the notes to the following section.

(*n*) The withdrawal of the Sovereign from an active part in executive matters dates from the accession of George I. (see Hallam, Constitutional History, Vol. III., p. 388; Todd, Parliamentary Government, Vol. II., p. 115; and note (*e*), p. 45, *post*). Attempts on the part of the Sovereign to revive the personal influence are viewed unfavourably by Parliament (see Mr. Dunning's famous motion, carried in the reign of George III., "that the influence of the Crown has increased, is increasing, and ought to be diminished" (Cobbett, Parliamentary History, Vol. XXI., p. 340)). The Crown ought not to attempt to influence the actions of executive officers without seeking and acting upon the advice of the minister responsible to Parliament. Thus, when George IV. wished to influence the Lord Lieutenant of Ireland in exercising the prerogative of mercy, it was pointed out by Sir Robert Peel, then Home Secretary, that the advice of the responsible minister must first be asked, and the Crown gave way (see Anson, Law and Custom of the Constitution, 3rd ed., Vol. II., p. 44); otherwise George IV. does not appear to have interfered in administrative matters (Todd, Parliamentary Government, Vol. I., p. 181). The private correspondence of the Sovereign with foreign Sovereigns or ministers ought, it is said, to be disclosed to the Prime Minister or the Foreign Secretary if touching on political questions, and was habitually so disclosed by Queen Victoria and the Prince Consort (Anson, Law and Custom of the Constitution, 3rd ed., Vol. II., p. 43). But in paying formal visits of state to the crowned heads of foreign nations the King is not necessarily accompanied by the Foreign Secretary or any member of the Cabinet, though such visits are jealously regarded by Parliament (see the questions in the House of Commons as to the recent visit to the Tsar of Russia, Parliamentary Debates, 4th series, Vol. CLXXXIX., pp. 963, 965, 966, 1118, 1119, 1262, 1290, 1570, 1571). But though it is not reasonable that the Sovereign, who is often connected by ties of relationship with the

SECT. 1. In General.

dismiss the ministry, dissolve or prorogue Parliament, or withhold his assent to Bills, when he pleases, but in practice the occasions upon which these prerogatives may be exercised in a constitutional manner are sufficiently clearly defined (*o*), since these powers form the constitutional checks by which conformability in executive and legislative matters to the wishes of the House of Commons, and ultimately of the electorate, is ensured (*p*). In the impartial exercise of these prerogatives, as also in his position as permanent head of the executive, in whom the various threads of the administration are centred, and as the representative of the national power and dignity, independent of and above the changes and intrigues of party government, the true significance and importance of the Sovereign as a constitutional monarch are to be found.

SUB-SECT. 2.—*Executive Documents.*

Public documents.

5. The wishes or commands of the Crown in matters intrusted to its executive authority either by the common or statute law are made known to the nation, or to the individuals particularly concerned, by means of various documents, which are either (1) Orders in Council; (2) warrants, commissions, or orders under the sign manual; or (3) proclamations, writs, letters patent, letters close, charters, grants, and other documents under the Great Seal.

Orders in Council.

6. Orders in Council are the general medium by which the manifold statutory powers conferred upon the Crown are exercised (*q*), though they may also be employed in expressing the wishes of the Crown with regard to matters falling within its discretionary authority by virtue of the prerogative (*r*). They are formulated by the various ministers or departments concerned with the particular matter to which the Orders relate, and their general policy is determined by the Cabinet (*s*); they are expressed

heads of foreign nations, should never meet the latter except in the presence of a Cabinet minister (see *ibid.*, *per* Mr. Asquith, at p. 1571), the political wishes or intentions of the Sovereign ought to be fully disclosed to his ministers, since it is unconstitutional for him to take independent action in foreign politics (see Anson, Law and Custom of the Constitution, 3rd ed., Vol. II., p. 43); and a minister cannot escape responsibility for any independent action which may be taken by the Crown. See the impeachment of Lord Somers in 1701 for causing the Great Seal to be affixed to the partition treaties concluded by William III. in 1698 and 1699 without lawful warrant and without communicating the same to the Lords Justices and the Privy Council (*Somers'* (*Lord*) *Case* (1701), 14 State Tr. 250, 253, 254). The constitutional procedure, *semble*, in case of the insistence of the Crown, would be for the ministry to tender their resignation. On two occasions Lord Hardwicke, L.C., refused to affix the Great Seal to treaties when requested to do so by George II. (see Todd, Parliamentary Government, Vol. I., p. 42; Harris, Life of Hardwicke, Vol. II., pp. 59, 369).

(*o*) See Vol. VI., p. 390, and p. 49, *post*.

(*p*) Thus, the power of dismissal at any moment enables the Crown to prevent the adoption of measures distasteful to the House of Commons, whilst the power of dissolving Parliament, or of withholding assent to Bills, may be similarly exercised in upholding the wishes of the electorate.

(*q*) For the various matters to which such Orders relate, see the Statutory Rules and Orders.

(*r*) *E.g.*, legislation for Crown colonies, regulations with regard to trade and commerce in time of war, etc.

(*s*) See p. 5, *ante*.

to be made by the Sovereign by and with the advice of the Privy Council at meetings of the latter, which are held at such times as the exigencies of public business require, and are signed by the Clerk of the Council (*t*).

The sign manual.

7. Orders, warrants, and commissions under the sign manual are used under the powers conferred by the common or statute law, and relate to a variety of matters, such as the appointment of executive officers (*a*), and the authorisation of the performance of executive acts (*b*).

In some cases the sign manual, warrant, or order requires the addition of one of the secretarial seals (*c*); but it is said that there are grants under the sign manual which pass through certain offices, such as the Admiralty and Treasury, without the confirmation of the signet, or of the Great or the Privy Seal (*d*). Where such confirmation is not necessary, sign manual documents are usually required to be countersigned by a Secretary of State or other responsible minister or ministers (*e*).

Scottish seals.

As from the date of the Union with Scotland Act, 1706, the Privy Seal, signet, casset (casket) signet of the Justiciary Court, quarter seal, and seals of courts then used in Scotland were directed to be continued, but were to be altered and adapted to the state of the Union as the Sovereign should think fit. The seals and the keepers of them are to be subject to regulations made by Parliament (*f*).

Validation.

8. In case of the illness, insanity, or absence of the Sovereign, various expedients have been resorted to in order to give validity to documents which require the royal signature (*g*).

(*t*) As to the Privy Council generally, see p. 51, *post*.

(*a*) *E.g.*, the Governor-General of India and the Governors and Advocates-General of the several presidencies appointed by sign manual warrant under the Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 29; see also p. 21, *post*. The Governors of colonies are appointed by commission under the sign manual and signet. First commissions in the army and navy are granted under the sign manual and second secretarial seal (see Anson, Law and Custom of the Constitution, 3rd ed., Vol. II., p. 52).

(*b*) *E.g.*, warrants for affixing the Great Seal to executive documents, countersigned by the necessary minister (see p. 11, *post*); pardons, countersigned by a Secretary of State (7 & 8 Geo. 4, c. 28, s. 13) (see Vol. VI., p. 405); orders for the issue of public money by the Treasury, countersigned by two or more of the Treasury Commissioners (Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), s. 14); orders for the execution by decapitation of persons convicted of treason (see Vol. VI., p. 352).

(*c*) See the instances in note (*a*), *supra*.

(*d*) 2 Bl. Com., 14th ed., 347. The use of the Privy Seal is now no longer necessary in any case.

(*e*) See the instances given in note (*b*), *supra*.

(*f*) Union with Scotland Act, 1706 (6 Ann. c. 11; 5 Ann. c. 8, Ruff.), art. 24.

(*g*) In the absence of the Sovereign abroad, lords justices were formerly frequently commissioned, but that is generally no longer necessary, owing to the more rapid means of communication. For the occasions on which commissions have been issued, and the form of commission and instructions used in 1719, see Commons' Journal, Vol. XLIV., pp. 37—42; and see Vol. VI., p. 377, note (*k*). On the insanity of George III. in 1811 the Lords and Commons passed resolutions that it was expedient and necessary for letters patent in the form

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Use of the Great Seal of the United Kingdom.

9. Since the date of the Union with Scotland (namely, the 1st May, 1707) it is expressly provided that the Great Seal of the United Kingdom (*h*) is to be used for sealing writs to elect and summon the Parliament of Great Britain, and for sealing all treaties with foreign princes and States, and all public acts, instruments, and orders of State which concern the whole United Kingdom (now including Great Britain and Ireland) and in all other matters relating to England as the Great Seal of England was used prior to the date of the Union (*i*).

As to Ireland.

10. Since the date of the Union with Ireland (namely, the 1st January, 1801) it is also expressly provided that proclamations for causing the return of the Lords Spiritual and Temporal and Commons who are to serve in Parliament on the part of Ireland, and writs to the Chancellor of Ireland on a vacancy occurring in the number of the Irish representative peers of Ireland, directing him to cause the election of a new representative peer, shall be issued under the Great Seal of the United Kingdom (*j*).

Use of the seal in Scotland.

11. As from the date of the Union with Scotland a seal is directed to be always kept in Scotland and made use of in all things relating to private rights or grants which usually passed the Great Seal of Scotland (prior to the Union), and which only concern offices, grants, commissions, and private rights within that kingdom (*k*).

Use of the Great Seal of Ireland.

12. Except where it is otherwise expressly provided by the articles of union (namely, in the manner stated above), as from the date of the Union the Great Seal of Ireland may be used in like manner as before the Union, if the Sovereign so thinks fit (*l*).

Authority for sealing.

13. The passage of documents under the Great Seal, which formerly required complicated processes and authorities (*m*), has

agreed to to be passed under the Great Seal appointing commissioners for affixing the royal assent to the Regency Bill (see Commons' Journal, Vol. LXVI., pp. 79—81, and Vol. VI., p. 376, note (*d*)). On the last illness of George IV. an Act was passed (11 Geo. 4, c. 23) enabling the royal sign manual to be affixed by a stamp in his presence and by his command.

(*h*) See as to this seal, *infra*.

(*i*) Union with Scotland Act, 1706 (6 Ann. c. 11 ; 5 Ann. c. 8, Ruff.), art. 24.

(*j*) Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), arts. 4, 8, s. 2.

(*k*) Union with Scotland Act, 1706 (6 Ann. c. 11 ; 5 Ann. c. 8, Ruff.), art. 24. Until such seal should be appointed by the Sovereign, the Great Seal of Scotland then existing was directed to be used for such purposes (*ibid.*).

(*l*) Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 8, s. 3.

(*m*) Namely, (1) bill drawn up by the Attorney or Solicitor General pursuant to the royal warrant, and signed by the King, and sealed with the Privy Signet: in such cases the document was subscribed *per ipsum regem;* (2) extract of the bill (as above, but without the royal signature or signet) carried to the Keeper of the Privy Seal, who made out a writ or warrant thereon under the Privy Seal to the Crown Office; such documents were subscribed *per breve de privato sigillo.* See 2 Bl. Com., 14th ed., 346; statute 27 Hen. 8, c. 11; statute (1851) 14 & 15 Vict. c. 82, s. 2, repealed by the Great Seal Act, 1884 (47 & 48 Vict. c. 30), s. 5. Under the last-mentioned Act documents which previously required

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been simplified in various ways (*n*), and now a warrant under the sign manual (*o*) countersigned by the Lord Chancellor (*p*), or by one of the principal Secretaries of State, or by the Lord High Treasurer or two of the Treasury Commissioners, is a necessary and sufficient authority for passing any instrument (*q*) under the Great Seal of the United Kingdom (*r*), according to the tenor of the warrant. But any instrument which might on the 28th July, 1884, be passed under the Great Seal by the fiat or under the authority or directions of the Lord Chancellor, or otherwise without passing through any other office, may continue to be so passed (*s*).

Clerk of the Crown in Chancery.

14. All the duties formerly vested in the Clerk of the Petty Bag (other than with respect to solicitors, the administering of

the authority of a King's bill, or bills from the offices of the Signet and Privy Seal respectively, before passing under the Great Seal, were directed to be so passed under the authority of a sign manual warrant, countersigned by a Secretary of State and sealed with the Privy Seal. The offices of Clerks of the Signet and Clerks of the Privy Seal were abolished by the Act (*ibid.*, s. 3).

(*n*) The office of Clerks of the Signet and the necessity for the use of that seal for authorising the passage of documents under the Great Seal was abolished by the statute of 1851 (14 & 15 Vict. c. 82), ss. 2, 3. The necessity for the use of the Privy Seal in any case was abolished by the Great Seal Act, 1884 (47 & 48 Vict. c. 30), s. 3. Both these provisions have been repealed, but not so as to revive the use of the respective seals (Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22), s. 1).

(*o*) See note (*g*), p. 9, *ante*, as to the mode of signing in the case of illness or absence of the Sovereign. The documents sent to the Sovereign from the Crown Office are (1) the warrant for attaching the Great Seal, (2) the instrument itself, and (3) the docket, or short note of the contents of the instrument (see Anson, Law and Custom of the Constitution, 3rd ed., Vol. II., p. 51). This docket is different from that which is required in the case of letters patent, and which is subject to a stamp duty of 2*s*. under the Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.

(*p*) Namely, the Lord Chancellor of Great Britain, including the Lord Keeper or Lords Commissioners of the Great Seal of the United Kingdom, if there are such persons, in which case the warrant may be countersigned by any two of such commissioners (Great Seal Act, 1884 (47 & 48 Vict. c. 30), s. 4).

(*q*) "Instrument" includes any letters patent, letters close, writ, commission, and grant, and any document required to be passed under the Great Seal of the United Kingdom (Great Seal Act, 1884 (47 & 48 Vict. c. 30), s. 4).

(*r*) The Great Seals of Scotland and Ireland are still authorised to be used in certain cases (see, as to Scotland, the Union with Scotland Act, 1706 (6 Ann. c. 11; 5 Ann. c. 8, Ruff.), art. 24; as to Ireland, the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 8, s. 3). As to the seal of the Duchy of Lancaster, see p. 219, *post*.

(*s*) Great Seal Act, 1884 (47 & 48 Vict. c. 30), s. 2 (1). In the following cases the royal sign manual is not required: (1) for certain circuit commissions (namely, the autumn assizes and those held after Easter in Yorkshire and Lancashire, as to which see title COURTS), commissions of the peace, writs of summons to peers to attend the House of Lords on succeeding to the title, writs of *dedimus* giving power to administer oaths, *supersedeas* staying the exercise of a jurisdiction, and *mittimus* authorising the removal of records from one court to another, the fiat of the Lord Chancellor is sufficient; (2) for writs of summons at bye-elections, the warrant of the Speaker of the House of Commons suffices. (3) Orders in Council are used in the case of writs for the summons of a new Parliament, for charters incorporating towns, and for warrants from the Colonial Office (see Anson, Law and Custom of the Constitution, 3rd ed., Vol. II., pp. 56, 57). Commissions to affix the royal assent to Bills are signed by the Crown before sealing under the statute 27 Hen. 8, c. 11, s. 5; and, it seems, the same practice is observed as to commissions to open Parliament (see Anson, Law and Custom of the Constitution, 3rd ed., Vol. II., p. 56).

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oaths, the attending with records, the enrolment of documents, the sealing and issuing of documents or writs with or under the chancery common law seal—now *semble* the seal of the Central Office (*t*)—and other matters relating to the administration of justice (*u*)), including all duties and powers relating to any writs or letters patent passed under the Great Seal of the United Kingdom, are performed by and vested in the Clerk of the Crown in Chancery or his officers in such manner as the Lord Chancellor may from time to time direct (*v*).

If any doubt arises as to whether any duty or power of the Clerk of the Petty Bag is or is not transferred to the Clerk of the Crown in Chancery, the doubt is to be determined by the Lord Chancellor, whose decision is final (*w*).

Fees.

15. With the concurrence of the Treasury, the Lord Chancellor may from time to time by order appoint the fees to be taken in the office of or by the Clerk of the Crown in Chancery (*x*), or by any of his officers, or by any person performing the duties of messenger or pursuivant of the Great Seal (*a*) or gentleman of the chamber attending the Great Seal (*b*), and may from time to time

(*t*) See R. S. C., Ord. 61, rr. 1, 6.

(*u*) These duties, together with those of the former cursitors of the Court of Chancery (except such as are by the Solicitors Act, 1888 (51 & 52 Vict. c. 65), directed to be performed by the Law Society as Registrar of Solicitors), have been as from the 1st February, 1889, vested in the Senior Clerk of the Crown Office Department of the Central Office of the Supreme Court (R. S. C., 30th January, 1889, Statutory Rules and Orders Revised, Supreme Court, England, p. 931, issued under the joint authority of the Judicature Act, 1873 (36 & 37 Vict. c. 66), and the Great Seal (Offices) Act, 1874 (37 & 38 Vict. c. 81), s. 5.

(*v*) Great Seal (Offices) Act, 1874 (37 & 38 Vict. c. 81), s. 5. As to the use of wafer seals in lieu of the Great Seal, see p. 13, *post*. As to the wording and preparation of documents to be passed under the Great Seal, see p. 13, note (*h*), *post*.

(*w*) Great Seal (Offices) Act, 1874 (37 & 38 Vict. c. 81), s. 5.

(*x*) The Clerk of the Crown in Chancery is appointed by His Majesty under the royal sign manual, and is to continue to perform the duties of the office of Keeper or Clerk of the Hanaper. His salary is to be such as the Treasury may assign to him, and is to be paid out of moneys provided by Parliament (Great Seal (Offices) Act, 1874 (37 & 38 Vict. c 81), s. 8).

(*a*) The powers and duties of the messenger or pursuivant of the Great Seal relating to writs for the election of members of Parliament were directed to be transferred to and vested in such officer as the Lord Chancellor, with His Majesty's approval, should from time to time appoint, who is, if the Lord Chancellor so directs, to be styled messenger of the Great Seal in lieu of or in addition to any other style denoting his office, and the Parliamentary Writs Act, 1813 (53 Geo. 3, c. 89), so far as unrepealed, is to be construed as if the officer so appointed were substituted therein for the messenger or pursuivant of the Great Seal, with the qualification that the deputy mentioned in the Act is to be appointed by the Lord Chancellor in writing. All other duties and powers of the messenger or pursuivant are to be performed by such officer as the Lord Chancellor directs from time to time, and to any officer to whom duties are transferred under this provision such additional salary is to be paid as the Treasury, on the recommendation of the Lord Chancellor, assigns to him (Great Seal (Offices) Act, 1874 (37 & 38 Vict. c. 80), s. 4).

(*b*) The duties and powers formerly performed by or vested in the purse-bearer to the Lord Chancellor (including the duties of chaff wax sealer and deputy sealer) are now performed by and vested in the gentleman of the chamber attending the Great Seal, the office of the said purse-bearer having been abolished. The salary of the gentleman of the chamber attending the Great Seal is to be such

by order increase, reduce, add to, or abolish such fees; and no other fees than those so appointed are to be taken in the office of the Clerk of the Crown in Chancery (*c*).

Rules.

The Lord Chancellor may make rules relating to the preparation of warrants and instruments, and the manner in which the latter are to be passed under the Great Seal (*d*). But every warrant must be made by the Clerk of the Crown in Chancery (*e*).

Wafer Great Seals.

16. Wafer great seals made on embossed paper, wax, wafer, or any other material, in accordance with rules (*f*) drawn up by a committee of the Privy Council (*g*), may be attached to or embossed on documents authorised by the rules to be so validated, and confer the same validity in all respects as passage under the Great Seal, no proof that the attachment or embossing of the wafer seal was authorised being necessary, and no evidence to the contrary being receivable (*h*).

as the Treasury assign to him upon the recommendation of the Lord Chancellor (Great Seal (Offices) Act, 1874 (37 & 38 Vict. c. 81), s. 7).

(*c*) Great Seal (Offices) Act, 1874 (37 & 38 Vict. c. 81), s. 9. As to the fees at present appointed, see pp. 17 *et seq.*, *post*. Until an order under the above power is made the fees existing on the 7th August, 1874, including the fees payable in the office of the Clerk of the Petty Bag and of the Clerk of the Patents in respect of matters the transaction of which is transferred to the Clerk of the Crown in Chancery (see pp. 12, 13, *ante*), are to continue to be taken as if the Act had not been passed (*ibid.*).

(*d*) Great Seal Act, 1884 (47 & 48 Vict. c. 30), s. 2 (2). Such rules may be revoked or varied by the Lord Chancellor (*ibid.*). This power does not appear to have been exercised, but see note (*h*), *infra*, as to the rules made under the Crown Office Act, 1877 (40 & 41 Vict. c. 41). Letters patent appointing ordinary judges of the Court of Appeal are to be passed under the Great Seal in the same way as letters patent appointing judges of the High Court (Great Seal Act, 1880 (43 & 44 Vict. c. 10), s. 4).

(*e*) Great Seal Act, 1884 (47 & 48 Vict. c. 30), s. 2 (2).

(*f*) The rules, which may be revoked, added to or altered, must be laid before both Houses of Parliament within one month after they are made, or if they be not sitting, then within one month after the commencement of the next session. They are to be judicially noticed, and of the same validity as an Act of Parliament (Crown Office Act, 1877 (40 & 41 Vict. c. 41), ss. 4, 5).

(*g*) The committee is to be composed of the Lord Chancellor, the Lord Privy Seal, and a principal Secretary of State, acting in case of difference according to the opinion of two of them. The wafer seals are to be in the same custody as the Great Seal (Crown Office Act, 1877 (40 & 41 Vict. c. 41), s. 4). For the rules at present in force, see the next note.

(*h*) Crown Office Act, 1877 (40 & 41 Vict. c. 41), ss. 4, 5 (3). The rules may also provide for the mode of preparation of documents to which the Act applies (*ibid.*, s. 5 (a), (3), (b)). For the rules at present in force, see Orders in Council 22nd February and 8th August, 1878, Statutory Rules and Orders Revised, Vol. II., Clerk of the Crown in Chancery, pp. 9—19. The following documents are to have the wafer Great Seal attached to or embossed on them: royal proclamations; royal assent commissions; writs of summons to peers; writs of attendance to judges and the Attorney and Solicitor General; writs for the return of members of Parliament; writs of Convocation; commissions of the peace; commissions to open and prorogue Parliament; commissions of assize criminal and civil, of sewers, appointing colonial governors, constituting the office of governor of a colony, appointing readers of civil law at the universities; special commissions of oyer and terminer and gaol delivery, of escheat; grants of quarter sessions; letters patent appointing commissioners of inland revenue, commissioners for the customs, colonial and Indian bishops, Indian judges; letters patent and writs of restitution in temporalities; *congés d'elire* to deans and

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17. Making or preparing any warrant for passing any instrument under the Great Seal of the United Kingdom, or procuring any instrument to be passed under that seal, otherwise than in accordance with the rules and provisions stated above (*i*), constitutes a misdemeanour (*k*).

Royal proclamations.

18. In general, proclamations may legally be made and issued only by the authority of the Crown, and must be passed under the Great Seal (*l*), and no private person may make and issue a proclamation, unless the practice is warranted by custom (*m*), or unless he is expressly authorised to do so (*n*); fine and imprisonment may be inflicted for a breach of this provision (*o*).

The form in which royal proclamations are to be worded may be prescribed by Order in Council (*p*), as well as rules relating to the manner of publication, and as to the towns to which copies of proclamations are to be sent, and, generally, as to the best mode

chapters; royal charters; writs for electing Irish representative peers, of *mittimus* to the Lord Chancellor of Ireland, and of *supersedeas;* grants of pensions to judges; licences in mortmain; licences to theatres; exemplifications of decrees in Chancery; presentations to Crown livings; confirmations of degrees of Bachelors in Divinity. But, if it be found more convenient, the Lord Chancellor may direct any of the above to be passed under the Great Seal as formerly. By the same Order rules relating to the manner in which certain documents are to be written or printed are provided, and the name of the Clerk of the Crown subscribed or printed at the end of all documents is to be sufficient authentication of their having passed through the Crown Office (Order in Council 22nd February, 1878, *supra*). The form in which documents are to be worded may be prescribed by Order in Council to be laid before Parliament, as mentioned above (Crown Office Act, 1877 (40 & 41 Vict. c. 41), s. 3). This power does not appear to have been exercised except as to commissions of the peace. For the forms of royal assent to be used when Parliament is opened in person and by commission, see the Order in Council cited *supra*. As to patents for inventions, see p. 61, *post*.

(*i*) Namely, otherwise than in the manner provided by the Great Seal Act, 1884 (47 & 48 Vict. c. 30), and the Crown Office Act, 1877 (40 & 41 Vict. c. 41).

(*k*) Great Seal Act, 1884 (47 & 48 Vict. c. 30), s. 2 (3).

(*l*) *Keyley* v. *Manning* (1629), Cro. Car. 180. For the purposes of the Ballot Act, 1872 (35 & 36 Vict. c. 33), and of the enactments for the time being in force relating to the representation of the people and the registration of the persons entitled to vote at the election of members to serve in Parliament, the term "proclamation" as used in such enactments is to be deemed to include a public notice given in pursuance of the Ballot Act, 1872 (Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 15). As to what notices are required to be given under this Act, see title ELECTIONS.

(*m*) An instance of such a custom is the proclamation issued by members of the Privy Council and others announcing the accession of a new Sovereign, as to which see Vol. VI., p. 324.

(*n*) *Case of Proclamations* (1610), 12 Co. Rep. 74, 76; *Knightly's* (*Sir Edmund*) *Case* (1530), Bro. Abr. tit. Proclamations, pl. 10. In this case Sir Edmund Knightly, acting as executor, made and issued a proclamation that the creditors of the deceased were to come in and prove by a certain day. He was fined and imprisoned because he did it publicly and without authority. The authority is usually conferred by statute, *e.g.*, the Criminal Law and Procedure (Ireland) Act, 1887 (50 & 51 Vict. c. 20), ss. 5, 6, which empowers the Lord Lieutenant, with the advice of the Privy Council, to proclaim the Act in force in any specified districts, and to declare certain associations to be dangerous.

(*o*) *Knightly's* (*Sir Edmund*) *Case* (1530), *supra*.

(*p*) Crown Office Act, 1877 (40 & 41 Vict. c. 41), s. 3 (1). As to the requirements to be observed, see next note.

of making them known to the public (*q*). But any royal proclamation is valid in law as respects England, Scotland, and Ireland, if published in the *London Gazette*, the *Edinburgh Gazette*, or the *Dublin Gazette*, respectively (*r*).

When legally made and issued, royal proclamations are to be judicially noticed, and are of the same validity as an Act of Parliament (*s*). Any breach of their provisions is punishable by fine and imprisonment (*t*).

Use of proclamations.

Proclamations may be legally used to call attention to the provisions of existing laws (*a*), or to make or alter regulations over which the Crown has a discretionary authority, either at common law or by statute (*b*). Thus, the Crown may by proclamation summon or dissolve Parliament (*c*), declare war or peace (*d*), and promulgate blockades and lay embargoes on shipping in time of war (*e*). The fact that martial law is in force is usually notified by means of proclamations where such a course is rendered necessary by a state of war (*f*); and there is authority for their use to restrain persons from leaving the realm in time of war, in order to prevent their rendering assistance to the enemy (*g*). But these and other like prerogatives in time of war, being created for the public safety, are strictly limited by necessity (*h*). Proclamations may also be legally used when the Crown is authorised by statute to put in force statutory provisions which would otherwise remain dormant (*i*).

(*q*) Crown Office Act, 1877 (40 & 41 Vict. c. 41), s. 3 (2). These rules must be laid before both Houses of Parliament within one month from the time of making, or if they be not sitting, then within one month after the commencement of the then next session. They may be revoked, added to, or altered (*ibid.*, s. 3).

(*r*) Crown Office Act, 1877 (40 & 41 Vict. c. 41), s. 3 (3). On important occasions, such as a declaration of peace, the issue of the royal proclamation is sometimes accompanied by various forms and ceremonies. (For the ceremonies of thanksgiving observed on the announcement of peace with Russia in 1856, see the *London Gazette*, 1856, 28th April, pp. 1581—1586; 2nd May, p. 1622.) At common law royal proclamations may be published by any person (*Keyley* v. *Manning* (1629), Cro. Car. 180).

(*s*) Crown Office Act, 1877 (40 & 41 Vict. c. 41), s. 3.

(*t*) *Case of Proclamations* (1610), 12 Co. Rep. 74, 75.

(*a*) *E.g.*, in the case of war between two friendly States, to the provisions of the Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90). As to this Act, see title CRIMINAL LAW AND PROCEDURE. For examples of proclamations of neutrality during the Russo-Japanese war as to British territory, protectorates, and foreign jurisdictions, see Statutory Rules and Orders, 1904, pp. 152, 161, 174.

(*b*) 1 Bl. Com., 14th ed., 269, 270; Bac. Abr. tit. Prerog. D, 8; *Case of Proclamations* (1610), 12 Co. Rep. 74, 2 State Tr. 723.

(*c*) See Vol. VI., p. 389, and title PARLIAMENT.

(*d*) See Vol. VI., p. 440.

(*e*) See Vol. VI., p. 446.

(*f*) As to the legality of proclamations of martial law generally, see Vol. VI., p. 420.

(*g*) See 1 Bl. Com., 14th ed., 270; Fitz. Nat. Brev. 85; 3 Co. Inst. 179. As to the power of restraining subjects and others from leaving the realm generally, see Vol. VI., p. 446.

(*h*) See speech of Lord Erskine, 1808, Parliamentary Debates, Vol. X., 961. As to the war prerogatives generally, see Vol. VI., pp. 444 *et seq.*

(*i*) *E.g.*, the Criminal Law and Procedure (Ireland) Act, 1887 (50 & 51 Vict. c. 20) (see note (*n*), p. 4, *ante*). As to proclamations prohibiting the importation or exportation of explosives, arms, ammunition etc., see Vol. VI., p. 448.

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Restrictions on proclamations.

But, under the general rule which restrains the Crown from legislating apart from Parliament (*k*), it is now well-settled law that the King's proclamation, unless authorised in that behalf by statute, cannot enact any new law, or make provisions contrary to old ones (*l*). Nor may the King's proclamation restrict the liberties of the subject in matters upon which the laws are silent (*m*). Thus, it has been held that the King could not by proclamation prohibit the erection of new buildings in and about London, or the making of starch of wheat, for that would be to alter the law of the land (*n*). Where, in order to prevent famine, and Parliament not being assembled, an embargo was laid on all ships laden with wheat and flour in time of peace, and contrary to express statutory provisions (*o*), it was found necessary to indemnify by statute the advisers of the Crown, and all persons acting under the proclamation (*p*).

Writs under Great Seal.

19. Writs under the Great Seal are in the form of a command to do or abstain from doing a certain thing, and are used for a variety of purposes—as for summoning a person to the House of Lords, and thus conferring a new peerage, or confirming an already existing one (*q*), for summoning a new Parliament (*r*), or for bye-elections (*s*). Writs of *dedimus*, *supersedeas*, and *mittimus* are also issued under the Great Seal (*t*); but writs of summons in actions are not so issued, but are under the seal of the court, tested in the name of the Lord Chancellor (*a*). Writs under the Great Seal directed to particular persons for particular purposes are sometimes closed up and sealed on the outside, and are then known as writs

(*k*) See Vol. VI., p. 388.

(*l*) *Re Grazebrook, Ex parte Chavasse* (1865), 4 De G. J. & Sm. 655, 662. The statute 31 Hen. 8, c. 8, provided that proclamations issued with the advice of the council were to have the force of statutes, but this was repealed by the statute 1 Edw. 6, c. 12, s. 5. Proclamations were, however, frequently issued and enforced by the Star Chamber down to 1640, when that court was abolished (see Vol. VI., p. 379, note (*c*).

(*m*) *Case of Proclamations* (1610), 12 Co. Rep. 74, 75.

(*n*) *Ibid.* This opinion was given by the two Chief Justices and two Barons of the Exchequer after conference with the Privy Council. See also the same case, 2 State Tr. 726: "The King cannot create any offence which was not an offence before, for then he may alter the law of the land in his proclamation in some high point. . . . The law of England is divided into three parts: the common law, statute law, and custom; but the King's proclamation is none of these. . . . The King has no prerogative but that which the law of the land allows him." As to the right of the Crown to legislate in colonies having no representative government, see Vol. VI., p. 426.

(*o*) 12 Car. 2, c. 18, repealed 6 Geo. 4, c. 105.

(*p*) 7 Geo. 3, c. 7. This was the last occasion upon which the Crown attempted to legislate by proclamation.

(*q*) See 1 Bl. Com., 14th ed., 400, and title DIGNITIES.

(*r*) See note (*s*), p. 11, *ante*. As to the persons to whom the writs are directed, see title PARLIAMENT.

(*s*) See note (*s*), p. 11, *ante*, and title PARLIAMENT.

(*t*) See note (*s*), p. 11, *ante*.

(*a*) R. S. C., Ord. 5, r. 11; Ord. 2, r. 8; and see title PRACTICE AND PROCEDURE. Writs of *certiorari*, *mandamus*, and prohibition are tested by the Lord Chief Justice and sealed by the court (see Crown Office Rules, 1906, Append., Forms 1, 37, 39, and title CROWN PRACTICE).

close, or letters close (*literæ clausæ*), and are recorded in the close-rolls (*b*).

Letters patent etc.

20. Letters patent, grants, and charters under the Great Seal are used for conferring titles or dignities (*c*), franchises and other rights of property (*d*), or for creating and conferring offices (*e*), or incorporating towns or other bodies; whilst commissions are generally used for appointing persons to particular offices or to perform particular functions (*f*). The documents authorising the making and ratification of treaties are passed under the Great Seal under the authority of a sign manual warrant (*g*).

Fees.

21. In addition to the fees required to be paid in certain cases by means of stamps upon royal grants and licences (*h*), fees in cash must be paid, either in the office of the Clerk of the Crown in Chancery, or in the Great Seal Patent Office, upon the making and sealing of various grants, writs, commissions, and other executive documents (*i*).

(*b*) As distinguished from letters patent, which are recorded on the patent rolls (see 2 Bl. Com., 14th ed., 346; and Vol. VI., p. 476, note (*r*)).

(*c*) Grant of a peerage by letters patent confers only a life peerage, unless there are words of inheritance, whereas a writ of summons to the House of Lords, followed by taking a seat, enures to the heirs of the grantee's body without express words. But in the latter case the writ must be followed by taking a seat, whereas in the former the title enures and descends in accordance with the grant, whether the grantee takes his seat or not (see 1 Bl. Com., 14th ed., 400, and note (6), *ibid.*; see also title DIGNITIES).

(*d*) See Vol. VI., p. 489.

(*e*) *E.g.*, the creation of governors and councils in Crown colonies (see Vol. VI., p. 423, and title DEPENDENCIES AND COLONIES); the appointment of judges (see p. 13, *ante*).

(*f*) *E.g.*, the circuit commissions (see title COURTS); commissions for opening or proroguing Parliament, or affixing the royal assent to Bills (see note (*s*), p. 11, note (*h*), p. 13, *ante*, and title PARLIAMENT.

(*g*) See p. 10, *ante*; and as to the necessity for passing the treaties themselves under the Great Seal, see Vol. VI., p. 440.

(*h*) Under the Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I. See as to royal grants, Vol. VI., p. 493; as to the stamps on documents relating to the appointment of bishops, Vol. VI., p. 398; as to royal warrants, Vol. VI., p. 493.

(*i*) The following fees are payable to the Clerk of the Crown in Chancery by Order of 20th June, 1871, under the Courts of Justice Salaries and Funds Act, 1869 (32 & 33 Vict. c. 91), s. 16:—

Patents of creation:—Duke, £350; marquis, £300; earl, £250; viscount, £200; baron, £150; writ calling eldest son to his father's barony, £100; grant and confirmation of barony to one of several daughters, £150; baronet, £150; in addition a fee of £100 is charged for every remainder.

Knight bachelor, patent of creation, £50; Lord Lieutenant of Ireland, three gilt skins, £25; Treasury commission, gilt skin, £10; Admiralty commission, three skins, £10; Inland Revenue commission, £10; Customs commission, £10; ordinary commissions, namely, colonial bishops, Indian judges, audit commissions, governors of colonies, commissions of inquiry, and all civil commissions not comprised in the above, £10; Law patents, namely, King's Counsel, and patents of precedence, £30; King's Master of the Rolls, Lords Justices, £15; King's judge of a superior court, £25; lord lieutenant of a county, £15; custos rotulorum of a county, £15; commission of sewers, £15; justice of the peace *dedimus*, £3; general *dedimus*, £10; special *dedimus*, £1; Scotch *dedimus*, £5; commission of peace England and Wales, irrespective of the

SECT. 1. **In General.** Fees.

Certain fees formerly payable to the Clerk of the Petty Bag are now payable either in the office of the Clerk of the Crown in Chancery or in that of the Senior Clerk of the Crown Office Department of the Central Office of the Supreme Court (*k*).

number of names, £1 ; commission of peace, Scotland, £3; copies of indenture and return, 10*s.* each, £1; Attorney and Solicitor General, £30.

The following fees formerly payable to the Secretary of Presentations (by Order of 18th July, 1871, under a similar authority), whose office was abolished by the Crown Office Act, 1890 (53 Vict. c. 2), s. 1 (1), are now payable to the Clerk of the Crown in Chancery, to whom his duties were transferred by the latter Act:—

On appointment or nomination by Royal grant:—To a deanery, archdeaconry, prebend or canonry, or regius professorship, £10 ; to a rectory, vicarage, chapelry, perpetual curacy, or mastership of a school, £8.

On appointment or nomination by the Lord Chancellor:—To a prebend, canonry, or fellowship, £10 ; to a rectory, vicarage, chapelry, perpetual curacy, or mastership of a school or hospital, £8; on execution of a deed by the Lord Chancellor, £1.

The following fees are payable to the Clerk of the Crown in Chancery in addition to all other fees, in lieu of the fees formerly payable to the Clerk of the Patents and the Attorney and Solicitor General, in respect of warrants for letters patent to be passed under the Great Seal (Order of 11th August, 1881, under the Great Seal (Offices) Act, 1874 (37 & 38 Vict. c. 81), s. 9):—Charter of incorporation of a public company or society, or town, or any other charter, £30; on a grant of the dignity of a peer of the United Kingdom, £30 ; on each additional grant and each remainder, £25 ; on a grant of the dignity of a baronet, £20 ; on a grant of each remainder, £15 ; on a grant of the dignity of a knight, £10 ; on an appointment to an office, licence in mortmain, royal assent, £10 ; and on every other warrant not comprised in the above, £10.

The following fees are payable in the Great Seal Patent Office, in respect of letters patent passed under the Great Seal, on grant (Order of 18th July, 1871):—Charter of incorporation of a public company, £35; charter of a town, £35 ; letters of denization, £18 ; Crown lands on exchange, £18 ; escheated lands, £18 ; licence to a company to sue and be sued in the name of public officers, £18 ; licence to amend bye-laws of professorship, £18 ; licence in mortmain, £18 ; licence for theatre, £18 ; licence for Convocation, £18 ; licence to confirm alteration of canons, £4.

All the above fees are payable in cash (see Order of 30th June, 1891). For all the above orders see Stat. R. & O. Rev., Vol. II., Clerk of the Crown in Chancery.

(*k*) These fees are made payable by the Petty Bag Rules, 1848, issued under statute 11 & 12 Vict. c. 94, s. 19, repealed by the Great Seal (Offices) Act, 1874 (37 & 38 Vict. c. 81), with a saving for anything done thereunder. The fees were formerly payable to the Clerk of the Petty Bag, but will now be payable, as to such of his duties as have been transferred, to the Clerk of the Crown in Chancery and the Senior Clerk of the Crown Office Department of the Central Office respectively (see p. 12, *ante;* and as to the continuance of the fees payable to the Clerk of the Petty Bag, see note (*c*), p. 13, *ante*), in the respective offices of these officials.

The following fees (relating to duties not transferred to the Clerk of the Crown in Chancery) are payable in the Crown Office Department of the Central Office:—On every *dedimus potestatem* issued from the Crown Office to swear a justice of the peace, 2*s.* 6*d.* ; for enrolling every surrender, £1 10*s.* ; for the admission of every master in Chancery, £1 12*s.* 6*d.* ; for administering every oath and qualification in court (except on admission of solicitors), £2 2*s.* ; for swearing any officer of the court whose admission is enrolled in the (former) Petty Bag Office (except solicitors) and enrolling the admission, £5 ; for attending with records or other documents in any court or place (besides expenses to be retained by the officer to his own use), *per diem*, £2 2*s.* ; for filing the returns to all special commissions and writs of peace on *supplicavit*, and commissions and writs of every kind returned and filed in the (former) Petty Bag Office, 2*s.* 6*d.* ; entering appearance, for every defendant, 10*s.* ; for entering every rule requiring entry

22. The manner in which members of the ministry and executive officers generally are appointed by the Crown varies as Appointment.

only, 7*s.*; for drawing up and entering every other rule, 10*s.*; for drawing up and entering a special order, £2; for signing every judgment or entry of *nolle prosequi*, £1; for filing a record of issue on a traverse and sealing the transcript, £5; for filing a record of issue on a bill against an officer of the court, £2; for filing order for delivery out of bond, 10*s.*; for swearing every deponent to an affidavit, 1*s.* 6*d.*; for every exhibit thereto, 2*s.* 6*d.*; for taxing a bill of costs, for every side, 1*s.*; for filing every affidavit, 1*s.*; for office copy of affidavit, per folio, 4*d.*; for filing every bill against an officer of the court, 10*s.*; for preparing, engrossing, and perfecting the exemplification of any record, if one skin only, £5 5*s.*; for every additional skin, £1 6*s.* 8*d.*; for every search for a præcipe or writ filed, 1*s.*; for searching the calendar, for every year, 1*s.*; for inspection of any record besides the search, 2*s.* 6*d.*; for the office copy of any record, per folio, 4*d.*; for certificate of examination under the officer's hand and the office seal, 3*s.* 4*d.*; for the re-examination of the copy of any record, if short, 3*s.* 6*d.*; if long, per folio, 1*d.*; drawing and signing the certificate under the officer's hand of any return being filed in the (former) office of the Petty Bag where no office copy is taken, 2*s.*; for preparing and issuing every *certiorari* other than to remove causes from inferior courts, £3; for preparing every *mittimus* and transcript of commission of lunacy, return and inquisition thereon to the Lord Chancellor of Ireland, £3; for preparing and issuing every special commission to seize lands escheated to the Crown (or purchased by aliens, or forfeited by felons; see now as to these Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 2, and title ALIENS, Vol. I., p. 301; as to forfeiture, abolished except on outlawry, Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 1), of one skin only, £6; for every additional skin, £3; fee for the Messenger to the Great Seal (see now, as to this office, the Great Seal (Offices) Act, 1874 (37 & 38 Vict. c. 81), s. 5, and p. 12, *ante*), £5 5*s.*; for sealing every *alias* or *testatum scire facias*, £2 10*s.*; for examining and filing every bond of indemnity against costs and affidavits, £1; for filing a traverse to an inquisition, £2.

The following fees are payable under the Petty Bag Rules, 1848, in the office of the Clerk of the Crown in Chancery (see Stat. R. & O. Rev., Supreme Court, England, p. 928):—For filing every qualification of a member of Parliament, 2*s.*; for every *congé d'elire* for an archbishop, £19 5*s.* 8*d.*; for every *congé d'elire* for a bishop, £9 17*s.* 10*d.*; for every Royal assent for an archbishop, £9 17*s.* 10*d.*; for every Royal assent for a bishop, £9 17*s.* 10*d.*; for every patent of assistance and writs of restitution for an archbishop, £30 17*s.* 8*d.*; for every patent of assistance and writs of restitution for a bishop, £15 8*s.* 10*d.*; for every appointment of a bishop for the Isle of Man, £9 17*s.* 10*d.*; for the writ of summons to every peer and law officer, and for election of members, 7*s.* 2*d.*; for making out the commission for electing the peers of Scotland, £5 14*s.* 8*d.*; for drawing and engrossing the Parliament Pawn, £10; for drawing and engrossing the Parliament Pawn for Ireland, £5; the bags for the writs, 10*s.*; for drawing and entering an order to vacate letters patent, £2.

Under the same Order, in addition to a fee of 2*s.* 6*d.* on sealing every writ, the following fees are payable in the office of the Clerk of the Crown in Chancery:—(1) *Quare impedit* 10*s.*, and *ne admittas* 5*s.*, used, the one in the case of disturbance of advowson commanding the bishop, the pseudo-patron, and his clerk to permit the plaintiff to present a proper person, the other forbidding the bishop to admit a clerk pending the suit (see generally, 3 Bl. Com., 14th ed., 248, 249; stat. Westminster II., 1285 (13 Edw. 1, c. 5); Advowsons Act, 1708 (7 Ann. c. 18), s. 1): *quare impedit* lies upon the next or any other avoidance, in the case of disturbance, notwithstanding usurpation, which is not to displace the title to the advowson or patronage of any church vicarage or other ecclesiastical promotion. (2) *Supersedeas* 5*s.*, and *procedendo* 5*s.*, used, the one for superseding or suspending a commission of the peace, but not to totally destroy it (see, generally, 1 Bl. Com., 14th ed., 353; stat. 21 Jac. 1,

SECT. 1. In General.

to the different offices; but the more important posts in the administration are conferred directly by the Crown either by delivery of seals of office, as in the case of the Lord Chancellor,

c. 8, to be granted only on motion in open court and upon sufficient surety), the other for reviving the commission so suspended (see 1 Bl. Com., 14th ed., 353; and as to the use of the writ for removing causes from the superior courts into inferior courts, stat. 21 Jac. 1, c. 23, unrepealed). (3) *Venire* 15*s.*, by virtue of which the sheriff summons jurors for the assizes (see generally, 3 Bl. Com., *supra*, 353; Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 105, form of precept to sheriff etc. at assizes; *ibid.*, s. 107, assizes for London and Middlesex; Juries Act, 1825 (6 Geo. 4, c. 50), s. 20, preservation of former powers of criminal courts as to returns of jurors; *ibid.*, s. 22, power of judge of assize to divide jurors into two sets to attend at the beginning and residue of the assize. (4) *Contumace capiendo* 15*s.*, and *excommunicato capiendo* (or *significavit*) 15*s.*; the latter was used in case of non-submission to the sentence of excommunication of the spiritual court, certified to the King in Chancery (see title ECCLESIASTICAL LAW), and issued to the sheriff of the county directing him to take the offender and imprison him in the county goal until reconciliation to the Church, certified by the bishop, upon which it is said a writ *de excommunicato deliberando* issues out of Chancery to release him (Bl. Com., *supra*, p. 102). (5) *Ad quod damnum* 10*s.* (see as to the use of the writ prior to grants of markets and fairs, title MARKETS AND FAIRS. As to the former use for obtaining licences to alienate in mortmain, see 2 Bl. Com., 14th ed., 271). (6) *Coronatore eligendo* and *amovendo* 10*s.*, now directed to the county council or borough council, and not to the sheriff as formerly (see the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 5 (1), s. 38 (2), (5), and title CORONERS). (7) *Ventre inspiciendo* 15*s.*, granted to the presumptive heir, in the case of a widow feigning herself with child, when, it is said, the heir presumptive will be admitted to the inheritance if the widow is found not pregnant, though liable to lose it on the birth of a child within forty weeks from the death of the husband (see 2 Bl. Com., 14th ed., 456). (8) *Mittimus* (namely, committal to gaol by justices in cases not bailable, or where bail is not paid), upon *certiorari* or *significavit*, 15*s.* (see *supra* as to *significavit*). (9) *Regardatore*, or *viridario eligendo* or *amovendo* (namely, writs for the election or removal of regarders or verderers), 10*s.*, would appear to have fallen into disuse (see as to the ancient forest courts of regards, and those held before the verderers, 3 Bl. Com., *supra*, 71, 72). (10) Attachment 5*s.*, *capias ad satisfaciendum* 15*s.* (see as to the abolition of arrest for default in payment of money except in certain cases, the Debtors Act, 1869 (32 & 33 Vict. c. 62), ss. 4, 5).

The following fees relating to the Roll of Solicitors, in relation to which all the former duties and powers of the Clerk of the Petty Bag have been transferred to the Law Society as Registrar of Solicitors (see the Solicitors Act, 1888 (51 & 52 Vict. c. 65), ss. 5, 6, 7, 8), were made payable by the Order:—(1) On filing every affidavit of articles of clerkship, entering affidavit, and making the indorsements required by the Solicitors Act, 1843 (6 & 7 Vict. c. 73), 5*s.* (2) For striking every solicitor off the roll, either at his own request or otherwise, 7*s.* 6*d.*; for altering the name of every solicitor on the roll, 7*s.* 6*d.*; for every certificate of striking a solicitor off the roll, and for every other certificate not specifically mentioned in the order, 2*s.* 6*d.*

Fees are provided by the same order for the following obsolete or disused writs:—(1) Writs of *pone* 5*s.*, and *accedas ad curiam* 5*s.*, were formerly used to remove proceedings in all actions (other than the action by writ of right, which could be removed into the county court by precept from the sheriff called a *tolt*) from the court baron into the superior courts (see 3 Bl. Com., 14th ed., 33, 34). (2) *Recordari* 5*s.*, and false judgment 5*s.*, were used—the one to cause the plaint to be first recorded (the court baron not being a court of record), the other to release and review the cause at Westminster (see *ibid.*, p. 34). (3) *Justicies* 5*s.*, empowering the sheriff, for the sake of dispatch, to do the same justice in his county court as might otherwise be had at Westminster (see *ibid.*, p. 36). (N. B.—By Magna Carta, pleas of the Crown were forbidden to be heard in the old county or sheriff's court, and the writ of *pone* was also used to remove causes therefrom to Westminster). (4) Writ of privilege, formerly used

Lord Privy Seal, and the five Principal Secretaries of State (*l*); by letters patent under the Great Seal, as in the case of the Treasury and Admiralty Commissioners (*m*), the judges (*n*), and the law officers of the Crown (*o*); by warrant under the sign manual, as in the case of the Viceroy of India (*p*) and the Paymaster General (*q*); by commission under the sign manual and signet, as in the case of colonial governors (*r*); or by declaration of the Sovereign himself in Council, as in the case of the Lord President of the Privy Council (*s*). The Civil Service Commissioners for testing the qualifications of candidates for employment in the Civil Service, and for various other appointments, are appointed by Order in Council (*t*), whilst officers in the navy hold their commissions from the Admiralty (*u*); and the various Under-Secretaries and Parliamentary Secretaries are appointed directly by the political chiefs or boards under whom they act (*a*). First commissions to permanent rank in the land forces of the Crown and the royal marines are issued under the royal sign manual (*b*), and commissions to probationary rank, or for the promotion of officers not holding permanent commissions, are issued by a principal Secretary of State, or by the Admiralty in the case of the marines, and signed by the officer commanding-in-chief (whose duties have now devolved upon the Army Council),

Appointment of Executive officers.

as the only means of redress in cases of arrest and privilege of Parliament, and being in the nature of a *supersedeas*, 15*s*. (see 3 Bl. Com., 14th ed., p. 166). Since the statute 12 & 13 Will. 3, c. 3, repealed by the Statute Law Revision Act, 1867 (30 & 31 Vict. c. 59), the arrest is irregular *ab initio*, and the party may be discharged on motion (see Bl. Com., *supra*, 166; *Holiday* v. *Pitt* (1733), 2 Stra. 985, at p. 989).

Fees were also provided for the following abolished writs:—*Audita querula* 15*s*., abolished R. S. C., Ord. 42, r. 27; error to Parliament, abolished Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 11 (and see titles COURTS; PRACTICE AND PROCEDURE); commission of error and writ of error (writs of error and the powers and practice existing in the High Court on the 28th August, 1907, in respect of motions for new trials or the granting of the same in criminal cases in England abolished by the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 20 (1).

Writ of right of dower, abolished, and replaced by writ of summons by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126).

(*l*) The secretarial seals are the signet, the second secretarial seal, and the cachet. The office of the signet has now been abolished (see note (*n*), p. 11, *ante*), and each department now uses its own signet. An example of its use is in the commissions of appointment of and instructions to colonial governors.

(*m*) See, as to the Admiralty, the Admiralty Act, 1832 (2 & 3 Will. 4, c. 40), s. 1; as to the Treasury, the Consolidated Fund Act, 1816 (56 Geo. 3, c. 98), s. 2.

(*n*) See p. 13, *ante*.

(*o*) See *ibid.* and p. 72, *post*.

(*p*) See note (*a*), p. 9, *ante*.

(*q*) The warrant appointing the Paymaster General is countersigned by the Treasury (Paymaster General Act, 1835 (5 & 6 Will. 4, c. 35), s. 4).

(*r*) See note (*l*), *supra*.

(*s*) See p. 53, *post*.

(*t*) See Order in Council, 12th August, 1907, by which the present Commissioners are appointed.

(*u*) See title ROYAL FORCES.

(*a*) In the two last cases no special forms of appointment appear to be used or required.

(*b*) Order in Council, 5th May, 1873, s. 2, issued under the authority of the Officers Commissions Act, 1862 (25 & 26 Vict. c. 4), s. 1.

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and a principal Secretary of State, or by the Admiralty in the case of the marines (*c*).

Tenure of office.

23. Except where it is otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown (*d*), and all, in general, are subject to dismissal at any time without cause assigned (*e*); nor will an action for wrongful dismissal be entertained (*f*). But where the office is conferred by letters patent, procedure by *scire facias*, criminal information, or impeachment may, it seems, be necessary in order to vacate the office (*g*).

The judges.

24. The offices of the judges of the High Court and of the Court of Appeal, with the exception of the Lord Chancellor (*h*), the members of the Council of India (*i*), the Comptroller and Auditor-General and Assistant Auditor (*k*), and the assistant barristers in Ireland (*l*), are expressly directed to be held during good behaviour, subject to a power of removal upon an address to the Crown by both Houses of Parliament. Such offices may, it is said, be determined for want of good behaviour without an address to the Crown, either by *scire facias* (in the case of letters patent), criminal information, or impeachment, or by the exercise of the inquisitorial and judicial jurisdiction vested in the House of Lords (*m*).

Grant during good behaviour.

The grant of an office during good behaviour creates an office for life determinable upon breach of the condition (*n*), and behaviour means behaviour in matters concerning the office (*o*), except in the case of conviction upon an indictment for any infamous offence of such a nature as to render the person unfit to exercise the office,

(*c*) Order in Council, 5th May, 1873, ss. 1, 3. Promotion of officers holding permanent rank, or of officers not holding permanent rank, but who have already been promoted in the manner stated in the text, is notified in the *London Gazette*, and takes effect according to the tenor of the notification (*ibid.*, s. 4). See also title ROYAL FORCES.

(*d*) *Dunn* v. *R.*, [1896] 1 Q. B. 116, C. A., *per* Lord HERSCHELL, L.C., at p. 119.

(*e*) See as to officers in the army and navy, *Re Tufnell* (1876), 3 Ch. D. 164, and title CROWN PRACTICE; as to civil servants in the colonial service, *Young* v. *Adams*, [1898] A. C. 469; *Re New South Wales* (*Governor-General*), *Ex parte Robertson* (1858), 11 Moo. P. C. C. 288. See also *Grant* v. *Secretary of State for India* (1877), 2 C. P. D. 445; *Dickson* v. *Combermere* (*Viscount*) (1863), 3 F. & F. 527; and title CROWN PRACTICE.

(*f*) See the cases cited in the last note.

(*g*) See *Re New South Wales* (*Governor-General*), *Ex parte Robertson*, *supra*. The methods of determining an office held during good behaviour (which would, it seems, be applicable) were stated in the case of Sir Jonah Barrington to be (1) *scire facias*; (2) criminal information; (3) impeachment; (4) the exercise of the inquisitorial and judicial jurisdiction of the House of Lords (see Lords' Journal, 4th June, 1830, Vol. LXII., p. 602). As to *scire facias*, see title CROWN PRACTICE.

(*h*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 5.

(*i*) Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 11.

(*k*) Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), s. 3.

(*l*) Civil Bill Courts (Ireland) Act, 1851 (14 & 15 Vict. c. 57), s. 2.

(*m*) *Barrington's* (*Sir Jonah*) *Case* (1830), Lords' Journal, 4th June, 1830, Vol LXII., p. 602.

(*n*) Co. Litt. 42 a.

(*o*) 4 Co. Inst. 117.

which amounts legally to misbehaviour though not committed in connection with the office (*p*).

Misbehaviour as to the office itself means improper exercise of the functions appertaining to the office, or non-attendance, or neglect of or refusal to perform the duties of the office (*q*).

Removal from office.

25. Where an office is held during good behaviour subject to a power of removal by the Crown on an address from both Houses of Parliament, proceedings may, it seems, be initiated by a petition to either House of Parliament, praying for an address to the Crown (*r*), or by articles of charge presented to the House of Commons by a member (*s*); or proceedings may be originated in either House by a resolution for an address to the Crown to appoint a committee of inquiry into the conduct of the person designated (*t*), though preferably they should be commenced in the House of Commons (*a*). The charges upon which the proceedings are grounded must, however, be distinctly and specifically alleged, and must be such as would, if proved, be sufficient to warrant an address to the Crown for dismissal (*b*). If the facts alleged are sufficient, the House may proceed to refer the matter for inquiry either to a select committee or to a committee of the whole House (*c*), but in either case opportunity should, it seems, be given to the officer whose conduct is impugned to make his defence on a public inquiry at the Bar either of the Lords or Commons (*d*). If an address to the

(*p*) See *R.* v. *Richardson* (1758), 1 Burr. 517, at p. 539, on the subject of removal from office.

(*q*) *Shrewsbury's* (*Earl*) *Case* (1610), 9 Co. Rep. 46 b, 50 a.

(*r*) See *Fox's Case* (1805), Lords' Journal, Vol. XLV., pp. 181, 203, 204.

(*s*) See *M'Cleland's Case* (1819), Commons' Journal, 27th June, 1819, Vol. LXXIV., p. 493; Parl. Deb., Vol. XL., 850—4.

(*t*) *Barrington's* (*Sir Jonah*) *Case* (1830), Commons' Journal, 18th March, 1830, Vol. LXXXV., p. 196.

(*a*) In *Fox's Case* (see note (*r*), *supra*) the proceedings were commenced by petition in the House of Lords, but were subsequently abandoned on a resolution to the effect that no criminal complaint can be preferred originally in the Lords, that the House of Commons is the grand inquest of the High Court of Parliament, and that that House alone can bring complaints before the Lords for high crimes and misdemeanours (see Parl. Deb. (N. S.), Vol. VII., 757, 758). A protest against this course was, however, recorded by Lords Abercorn, Eldon, and others (see *ibid.*, p. 788), and the resolution would not now, it is apprehended, be acted upon.

(*b*) Thus in *M'Cleland's Case*, *supra*, a motion to refer the matter for inquiry was rejected on the ground that no such corrupt conduct had been imputed as would justify inquiry (see Commons' Journal, Vol. LXXIV., p. 493; Parl. Deb., Vol. XL., 850-854). In *Abinger's* (*Lord*) *Case* (1843) the complaint was the use of objectionable expressions in charges to the jury. But the motion to refer for inquiry was negatived because the charges were not specific (see Parl. Deb., 3rd Ser., Vol. LXVI., 1102, 1129, 1130).

(*c*) For reference to a select committee see *O'Grady's* (*Chief Baron*) *Case* (1821), Commons' Journal, Vol. LXXVI., p. 499; Vol. LXXVIII., p. 321. In *Barrington's* (*Sir Jonah*) *Case* (1830), note (*t*), *supra*, a select committee was reported to inquire into the report of the commission of inquiry in Ireland, and Sir Jonah was permitted to attend. The report of the select committee was ultimately considered in a committee of the whole House (see Commons' Journal, 18th March, 1830, Vol. LXXXV.), and Sir Jonah petitioned for a trial at the Bar, but this was refused (see Mirror of Parliament, 1830, pp. 1702, 1863, 1897).

(*d*) In *Barrington's* (*Sir Jonah*) *Case*, *supra*, evidence on oath having been taken and fully considered previously, the House refused a trial at the Bar of

SECT. 1. In General.

Crown is agreed to, it is communicated to the other House, and if not rejected there, is ultimately conveyed to the Crown, which replies in accordance with the terms of the address (*e*).

SUB-SECT. 4.—*Oaths of Office and Judicial Oaths.*

Oaths to be taken.

26. The oath of allegiance and official oath must be tendered to and taken by certain executive officers (*f*), and the oath of allegiance and judicial oath by certain members of the judiciary (*g*), in the form and manner prescribed (*h*), as soon as may be after their acceptance of office, and failure to take the oaths when tendered, or the solemn affirmation or declaration permitted in place of the oaths, entails vacation of the office, if already entered upon, or disqualification from holding the same, if not already entered upon. But no person may be compelled, in respect of the same appointment to the same office, to take the oaths, affirmations, or declarations more than once (*i*).

How taken.

27. The oath of allegiance and judicial oath (except as to judges of the Court of Appeal and of the High Court) are to be taken before such persons as His Majesty may from time to time appoint, or, in England, before the Lord Chancellor of Great Britain, or in open court before one or more of the judges of the High Court, or in open court at the general or quarter sessions of

the House, though it was questioned whether an address ought to be voted without a full public inquiry (see Mirror of Parliament, 1830, pp. 1702, 1863, 1897). On the subsequent proceedings in the House of Lords a petition for trial at the Bar of the House was granted (see Lords' Journal, 4th June, 1830, pp. 599, 602).

(*e*) *Barrington's* (*Sir Jonah*) *Case* (1830); see note (*t*) on p. 23, *ante*. For the terms of the reply, see Lords' Journal, Vol. LXII., p. 915, and Commons' Journal, Vol. LXXXV., p. 653, 22nd July, 1830. This appears to be the only case in which the proceedings were carried to a final conclusion.

(*f*) Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 5. These officers, so far as relates to England, are as follows (*ibid.*, Sched. I.):—First Lord of the Treasury, Chancellor of the Exchequer, Lord Chancellor, President of the Council, Lord Privy Seal, Secretaries of State, First Lord of the Admiralty, Chief Commissioner of Works and Public Buildings, President of the Board of Trade, Lord Steward, Lord Chamberlain, Earl Marshal, Master of the Horse, Chancellor of the Duchy of Lancaster, Paymaster General, Postmaster General, President of the Board of Agriculture and Fisheries (see the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 8 (2), but only if he is not one of the officers of State mentioned in s. 1 (1), *ibid.*), and President of the Board of Education (Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 8). The oath as to England is to be tendered by the Clerk of the Council, and taken in the presence of His Majesty in Council, or otherwise as His Majesty shall direct (Promissory Oaths Act, 1868, Sched. I.).

For the persons required to take the oath in Scotland and Ireland, see *ibid.*

(*g*) These are the Lord Chancellor of Great Britain (Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 6, Sched. II.; Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 5), and the judges of the High Court and of the Court of Appeal, who must take the oaths when entering on the execution of their offices in the presence of the Lord Chancellor (Judicature Act, 1875, *supra*). The Recorder of London and justices of the peace for counties and boroughs are also required to take the oath (Promissory Oaths Act, 1868, *supra*, Sched. II.). As to the judiciary in Scotland and Ireland, see Sched. II. of the Promissory Oaths Act, 1868.

(*h*) The forms are given by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), ss. 2, 3, 4, 10.

(*i*) Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), ss. 7, 11, 13.

the peace for the county, borough, or place in which the person taking the oaths acts as justice (*j*).

Affirmations.

28. Persons by law permitted to make a solemn affirmation or declaration may make a solemn affirmation by substituting certain words in the forms of judicial and official oaths as provided by the Promissory Oaths Act, 1868 (*k*).

Special oaths.

29. Other cases in which special oaths are required to be taken by persons before entering upon offices or dignities are the oaths of homage by archbishops and bishops (*l*), the oaths required to be taken by peers, baronets, or knights upon their creation (*m*), by members of Parliament on taking their seats (*n*), by members of the clergy (*o*), by privy councillors (*p*), by persons in the army and auxiliary forces (*q*), and by certain persons claiming to be the owners of British ships (*r*), and many other instances might be given (*s*).

Affirmations in lieu of oaths.

30. In all places and for all purposes where an oath is required by law, any person stating that he objects on the ground that he has no religious belief, or that the taking of an oath is contrary to his religious belief, may make a solemn affirmation in the manner provided, and the fact that he has no religious belief does not affect the validity of the oath so administered.

Wilfully, falsely, and corruptly affirming any matter or thing renders the person liable as in the case of an oath (*t*).

Swearing with uplifted hand.

31. Any person who so desires may, without further question, swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland (*u*).

(*j*) Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), s. 2. The Courts of Chancery, Queen's Bench, Common Pleas, and Exchequer mentioned in the section are now amalgamated into the High Court. As to the mode of taking the oaths in Scotland and Ireland, see *ibid.* As to the taking of the oath by the judges, see note (*g*), p. 24, *ante*.

(*k*) Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 11.

(*l*) See Vol. VI., p. 397, and title ECCLESIASTICAL LAW.

(*m*) See title DIGNITIES. The oath of allegiance in the form provided by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 2, is to be substituted for the oaths of allegiance, supremacy, or abjuration or any of them required to be taken in such cases (*ibid.*, s. 14 (5)).

(*n*) Under the Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), amended as to the oath of allegiance to be taken for the oath of allegiance, supremacy and abjuration, by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72). See title PARLIAMENT.

(*o*) Under the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), amended by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72). See title ECCLESIASTICAL LAW.

(*p*) See p. 52, *post*.

(*q*) See title ROYAL FORCES.

(*r*) Under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1, the oath of allegiance in such cases is to be in the form provided by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72). See s. 14 (8) of that Act, and, generally, title SHIPPING AND NAVIGATION.

(*s*) The various oaths required to be taken by public officers in 1867 are fully set out in the report of the Oaths Committee, 1867 (Parliamentary Papers, 1867, Vol. XXXI.), by which declarations in place of the oaths were recommended. Declarations or affirmations in lieu of oaths may now be made under the provisions stated on p. 26, *post*.

(*t*) Oaths Act, 1888 (51 & 52 Vict. c. 46), ss. 1—4.

(*u*) *Ibid.*, s. 5.

SECT. 1. In General.

Declaration in lieu of oath.

32. Except in the cases otherwise provided for by the Promissory Oaths Act, 1868 (*a*), or expressly excepted from the operation of that Act (*b*), where an oath is required to be taken by any person on or as a condition of his accepting any employment or office, a declaration is to be substituted therefor, and the making of the declaration is to have the same effect in all respects as the taking of the oath (*c*).

Household appointments.

In the case of oaths required to be taken as a condition of accepting any office or employment in His Majesty's band of gentlemen-at-arms, or bodyguard of Yeomen of the Guard, or in any other department of His Majesty's household, a declaration of fidelity is to be substituted with the addition (if so provided by Order in Council (*d*)) of a declaration of secrecy to be observed.

Officers of municipal corporations.

If before the 31st July, 1868, an oath was required to be taken on acceptance of any office in or under a municipal corporation, or on or as a condition of admission to membership in, or participation in the privileges of, any municipal corporation, there is to be substituted for such oath in either case respectively a declaration that the declarant will faithfully perform the duties of his office, or will faithfully demean himself as a member of, or participator in the privileges of, the corporation (*e*).

Admission to society etc

Where before the 31st July, 1868, an oath was required to be taken as a condition of admission to membership or fellowship or participation in the privileges of any guild, body corporate, society, or company, a declaration to the like effect is to be substituted for the oath. But if any two or more members,

(*a*) See pp. 24, 25, *ante*. An affirmation in place of an oath may be made in all cases; see p. 25, *ante*.

(*b*) Nothing in the Act is to affect: (1) the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), or the Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), except as to the oath of allegiance to be taken instead of the oath or oaths of allegiance, supremacy, and abjuration; (2) the oath taken by Privy Councillors of the United Kingdom or of Ireland, with a like exception as above; (3) the oath of homage taken by archbishops and bishops in His Majesty's presence; (4) the oaths of canonical obedience taken by bishops on consecration, and reserved by the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122); (5) any oath taken by peers, baronets, or knights on creation, with a like exception as above; (6) any oath required to be taken in the army, marines, militia, yeomanry, or volunteers; (7) the oath taken by aliens on naturalisation; (8) the oath taken by certain persons claiming to be the owners of British ships under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), now the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1; (9) any oath required or authorised by statute for the purpose of attesting any fact or verifying accounts or documents; (10) any oath or declaration taken in judicial ratification by married women under the law of Scotland; (11) any oath required by statute or custom to be taken by any juror, witness, or other person as preliminary to, or in the course of, any civil, military, criminal, or other trial, inquest, proceedings of a judicial nature (including any arbitration), or proceedings before a committee of either House of Parliament, or before any commissioner or any other special tribunal appointed by the Crown (Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 14).

(*c*) *Ibid.*, s. 12 (4) (5). The direction is expressed by "shall" in the Act; the provision would therefore appear to be compulsory.

(*d*) This power does not appear to have been exercised.

(*e*) Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 12 (2).

with the concurrence of the majority of the members present and voting at a meeting specially summoned for the purpose, object to any statement contained in the declaration on the ground of its relating to duties which by reason of change of circumstances have become obsolete, they may appeal to a principal Secretary of State to omit such statement, and his decision is to be final (*f*).

Where a declaration has been substituted for an oath, any person, guild, body corporate, or society, who or which before the 31st July, 1868, had power to alter the oath or to substitute another in its place, may exercise a like power with regard to the declaration (*g*).

Powers of Treasury.

33. Certain powers vested in the Treasury of substituting declarations for oaths may also be exercised (*h*); and in certain cases declarations have been substituted for the oaths and affidavits required to be taken by persons entering upon the discharge, or acting in the performance, of public duties (*i*).

(*f*) Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 12 (3).

(*g*) Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 15. Under the Statutory Declarations Act, 1835 (5 & 6 Will. 4, c. 62), the Treasury are empowered to substitute declarations for oaths in certain cases (see note (*h*), *infra*), and by the same Act the Universities of Oxford and Cambridge, and all other bodies corporate and politic and all bodies by law or statute, or by any valid usage, authorised on the 9th September, 1835, to administer or receive any oath, solemn affirmation, or affidavit, may make statutes, bye-laws, or orders authorising and directing the substitution of a declaration in lieu of any oath, solemn affirmation, or affidavit, at that date required to be taken, provided such statutes etc. are otherwise duly made and passed according to the charter, laws, or regulations of the particular university, or body politic or corporate (*ibid.*, s. 8).

(*h*) Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 14 (9). The powers are conferred by the Statutory Declarations Act, 1835 (5 & 6 Will. 4, c. 62), ss. 2—6, and are as as follows. In any case where any oath, solemn affirmation, or affidavit is required to be taken by any person for any purpose whatever by any Act or Acts relating to the revenues of Customs or Inland Revenue, the Post Office, the Office of Woods and Forests, Land Revenues, Works and Public Buildings (now the Departments of the Commissioners of Woods and Forests, and of the Commissioners of Works and Public Buildings), the War Office, the Army Pay Office, or the financial business of the Admiralty, the Treasury, Chelsea and Greenwich Hospitals, the Board of Trade, or any office of a principal Secretary of State, the India Board (now the Council of India (see title DEPENDENCIES AND COLONIES)), the Office of the Comptroller and Auditor-General, the National Debt Office, or any office under the control, direction, or superintendence of the Treasury, or by any official regulation in any department, the Treasury may by writing under their hands and seals substitute a declaration to the same effect as the oath, affirmation, or affidavit. A copy of the order must be inserted by the Treasury as soon as may be in the *London Gazette*, and the declaration must be administered in lieu of the oath, affirmation, or affidavit previously required after the expiration of twenty days next following the date of the *Gazette*. The declaration so made and published must be made and subscribed in presence of the person or persons empowered by the Act or Acts to administer the oath, solemn affirmation, or affidavit, and any person making a false declaration is guilty of a misdemeanour. These provisions do not affect any oath of allegiance required to be taken on appointment to any office (*ibid.*, s. 6).

(*i*) By the Statutory Declarations Act, 1835 (5 & 6 Will. 4, c. 62); oath of office of churchwardens and sidesmen abolished and declaration substituted

SECT. 1. In General.

34. All persons are bound by an oath administered in the form and with the ceremonies they may declare to be binding, and in the case of false swearing may be convicted of perjury (*k*).

Relief for omission to take oath.

35. Where any person is prevented or relieved from taking any oath, or making or subscribing any declaration under the Parliamentary Oaths Act, 1866, or the Promissory Oaths Acts, 1868 and 1871, which in either case respectively forms a condition precedent or subsequent to the attainment of any office, privilege, exemption or other benefit, or the due performance of any act, such person is nevertheless, on complying with the other conditions (if any) attached to the attainment of the same, or the due performance of the Act, to be entitled thereto, and be deemed to have duly performed such act (*l*).

Roman Catholics.

36. Subject to certain exceptions (*m*), British subjects professing the Roman Catholic religion may hold, exercise, and enjoy all civil and military offices and places of trust or profit under His Majesty, and exercise any other franchise or civil right (*n*). Nothing, however, contained in the Roman Catholic Relief Act, 1829, is to be construed to exempt any person professing such religion from the necessity of taking any oath or oaths, or making any declaration required by law on admission into any such office or place of trust or profit (*o*).

Abolition of oaths against transubstantiation.

37. Subject to an exception as to persons professing the Roman Catholic religion, it is not now obligatory for any person to take, make, or subscribe the declaration against transubstantiation required by various Acts as a qualification for the exercise or enjoyment of any civil office, franchise, or right within the realm (*p*).

(*ibid.*, s. 9, and see title ECCLESIASTICAL LAW); declarations substituted for oaths and affidavits under the Highways Acts (*ibid.*, s. 10, and see title HIGHWAYS ETC.); under the Pawnbrokers Acts (*ibid.*, s. 12), on transfers of stock at the Bank of England (*ibid*, s. 14); in actions and suits within colonies and dependencies relating to debt where any of the parties is resident in Great Britain (*ibid.*, s. 15, repealed as to Victoria by the Colonial Affidavits Act, 1859 (22 & 23 Vict. c. 12), s. 1); suits by the Crown relating to debts in any Colonies or dependencies (*ibid.*, s. 17, repealed as in last reference). Persons making false declarations are guilty of a misdemeanour (*ibid.*, s. 21), and fees are payable as on the taking of the oaths etc. formerly required (*ibid.*, s. 19)).

(*k*) Oaths Act, 1838 (1 & 2 Vict. c. 105).

(*l*) Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), s. 1 (1). Such person is to be entitled etc. in the same manner as if the condition relating to the oath or declaration and any directions as to the certificate or registration of the taking of the oath, or making or subscribing the declaration or otherwise, had been fulfilled and performed (*ibid.*). The provisions of the Promissory Oaths Acts are given *ante*, pp. 24 *et seq.*

(*m*) See as to guardians, regents, or justices of the United Kingdom, Vol. VI., p. 376. As to the Lord Chancellor or Keeper of the Great Seal, note (*u*), p. 56, *post*. See also, generally, title ECCLESIASTICAL LAW.

(*n*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 10), as partially repealed by the Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48).

(*o*) *Ibid.*, s. 11, as partially repealed as in the preceding note.

(*p*) Test Abolition Act, 1867 (30 & 31 Vict. c. 62) s. 1, as partially repealed by the Statute Law Revision Act, 1893 (56 & 57 Vict. c. 14). The Acts by which the oath was required are not recited, but the form of oath is given

SUB-SECT. 5.—*Pensions for Political Services.*

Political pensions.

38. The Crown may, where it thinks fit, by warrant under the sign manual, countersigned by two or more Treasury Commissioners, grant to any person who has held certain political offices (*q*), a pension during life, according to the following scale:—(1) A first-class pension not exceeding £2,000 per annum, in respect of a service of not less than four years, or its equivalent, in the office of First Lord of the Admiralty, and all other political offices remunerated with a yearly salary of not less than £5,000. (2) A second-class pension not exceeding £1,200 per annum, in respect of a service of not less than six years, or its equivalent, in a political office remunerated with a yearly salary of less than £5,000, and not less than £2,000. (3) A third-class pension not exceeding £800 per annum, in respect of a service of not less than ten years in a political office remunerated with a yearly salary of less than £2,000, and more than £1,000 (*r*).

Persons entitled.

39. Service for any time in an office of a lower class is to count as service for one-half that time in the class next above. But no person is to be entitled to a first or second-class pension who has not actually served two or three years in either class respectively. Any person who, having served for three years in a lower class, has afterwards served in a higher class for such time as would, if served in a lower class, have entitled him to a pension in the latter, is entitled to reckon the whole of his service as if passed in the lower class. The time of service may be continuous, or at different times, and in different offices of the above classes; but no pension in any class may be granted while four pensions of that class are subsisting; nor may more than one pension of whatever class be granted in the same year (*s*).

No office created after the 9th August, 1869, is to rank as a political office in either class, unless created by Act of Parliament; and no addition to the salary of any political office, whether created before or after that date, is to entitle such office to rank in a higher class unless the addition is made by authority of an Act of Parliament (*s*).

in the schedule. Nothing in the Act is to be construed to enable any Roman Catholic to exercise or enjoy any civil office, franchise, or right as to which the taking, making, or subscribing of the declaration abolished by the Act was on the 25th July, 1867, a necessary qualification, or any other civil office, franchise, or right from which he was on that date excluded (*ibid.*, s. 2). It may be noted that the Crown is not named, and therefore not bound by the Act (see Vol. VI., p. 409). It could, however, it is apprehended, take advantage of the Act (see *ibid.*).

(*q*) For the purposes of the Act "political offices" are offices in the civil service of the Crown which are usually held by members of the House of Lords or the House of Commons (Political Offices Pension Act, 1869 (32 & 33 Vict. c. 60), preamble). But the Act is not to apply (subject to the reservation in the text below) to any office in the permanent civil service of the Crown, or in the royal household, nor to any legal office other than the office of Judge Advocate-General (*ibid.*, s. 1).

(*r*) Political Offices Pension Act, 1869 (32 & 33 Vict. c. 60), ss. 2, 3.

(*s*) *Ibid.*, s. 4.

SECT. 1. In General.

Suspension of pension.

40. Where a person receiving any of the above pensions was, at the time of applying for the pension, or is afterwards, entitled to any emolument (including any salary, compensation, superannuation allowance, or pension) payable out of moneys raised by taxation, or out of any other public revenue in any part of His Majesty's dominions, or received by way of fees or otherwise, in respect of his holding any public office or employment in any part of His Majesty's dominions, the payment of the political pension is, so long as he receives the emolument, to be suspended or diminished, according as the amount of the emolument is greater than or equal to, or is less than the amount of the political pension. Any person who is entitled to such emolument, either at the time of application for, or while receiving, a political pension, must forthwith deliver to the Treasury a declaration under his hand stating the nature and amount thereof (*t*).

Application for pension.

41. The granting of political pensions being founded on a consideration, not only of the services performed by the individual to the State, but of the inadequacy of his private fortune to maintain his station in life, any person seeking the same must apply to the Treasury in writing, to which he must subscribe his name, and the application must contain a statement not only of the services performed by him, and the grounds on which the pension is claimed, but also a specific declaration that the amount of his income from other sources is so limited as to bring him within the above principle (*a*).

Payment.

42. Pensions in respect of offices of which the salary is paid out of the revenues of India are to be paid out of those revenues (*b*). All political pensions not so payable are to be charged upon and payable quarterly out of the Consolidated Fund, next in order of payment to, and after paying, or reserving sufficient to pay, all such sums of money as have been directed to be paid by any Acts prior to the 9th August, 1869, but with preference to all other charges thereafter to be charged upon the fund (*c*).

SUB-SECT. 6.—*Wearing of Official Robes.*

Wearing robes in church etc.

43. Any person holding any judicial or civil or corporate office may attend and be present at any place of public meeting for religious worship in England, Ireland, or Scotland, in the robe, gown, or other peculiar habit of his office, or with the ensign or insignia of or belonging to the same, and such attendance does not entail any forfeiture of office or other penalty (*d*).

SUB-SECT. 7.—*Official Secrets.*

Offences relating to disclosure of official information.

44. Certain offences relating to the wrongful obtaining or disclosing of official information are made punishable by law (*e*).

(*t*) Political Offices Pension Act, 1869 (32 & 33 Vict. c. 60), s. 6.
(*a*) *Ibid.*, s. 7 ; Superannuation Act, 1834 (4 & 5 Will. 4, c. 24), s. 6]
(*b*) *Ibid.*, s. 5.
(*c*) Political Offices Pension Act, 1869 (32 & 33 Vict. c. 60), s. 8.
(*d*) Office and Oath Act, 1867 (30 & 31 Vict. c. 75), s. 4.
(*e*) Namely, the Official Secrets Act, 1889 (52 & 53 Vict. c. 52).

Misdemeanours.

45. Any person is guilty of a misdemeanour, punishable on conviction with imprisonment with or without hard labour for not more than one year, or by fine, or both, who for the purpose of wrongfully obtaining information—

(1) Enters or is in any part of a place belonging to the Sovereign (*f*) being a fortress, arsenal, factory, dockyard, camp, ship, office, or other like place, in which part he is not entitled to be (*g*); or

(2) When lawfully or unlawfully in any of the aforesaid places, obtains any document (*h*), sketch, plan, model (*h*) or knowledge of anything which he is not entitled to obtain, or takes without lawful authority any sketch or plan (*i*); or

(3) When outside any fortress, arsenal, factory, dockyard, or camp belonging to the Sovereign, takes or attempts to take, without authority given by or on behalf of the Sovereign, any sketch or plan of that fortress, arsenal, factory, dockyard, or camp (*k*); or

(4) Where a person knowingly having possession of, or control over, any such document, sketch, plan, model, or knowledge as has been obtained or taken by means of any act constituting an offence under the Official Secrets Act, 1889, wilfully and without lawful authority communicates or attempts to communicate the same to any person to whom the same ought not, in the interest of the State, to be communicated at that time (*l*); or

(5) Where a person having been intrusted in confidence by some officer under the Sovereign with any document, sketch, plan, model, or information relating to any such place as aforesaid, or to the naval or military affairs of the Sovereign, wilfully and in breach of such confidence communicates the same, when in the interest of the State it ought not so to be communicated (*m*); or

(6) Where a person having possession of any document, sketch, plan, model, or information relating to any fortress, arsenal, factory, dockyard, camp, ship, office, or other like place belonging to the Sovereign, or to the naval or military affairs of the Sovereign, howsoever obtained or taken, wilfully communicates the same to any person to whom he knows the same ought not, in the interest of the State, to be communicated at that time (*n*).

Felonies.

46. A person is guilty of felony, punishable on conviction at the discretion of the court to penal servitude for life, or for any

(*f*) In the Act a place belonging to the Sovereign includes a place belonging to any department of the Government of the United Kingdom, or of any of His Majesty's possessions, though not actually vested in His Majesty (Official Secrets Act, 1889 (52 & 53 Vict. c. 52), s. 8).

(*g*) *Ibid.*, s. 1 (1) (a) (i.).

(*h*) Document includes part of a document. Model includes design, pattern, and specimen. "Sketch" includes any photograph or other mode of representation of any place or thing (*ibid.*, s. 8).

(*i*) *Ibid.*, s. 1 (1) (a) (ii.).

(*k*) *Ibid.*, s. 1 (1) (a) (iii.).

(*l*) *Ibid.*, s. 1 (1) (b). Expressions referring to communications under the Act include any communication, whether in whole or in part, and whether the document, sketch, plan, model, or information itself, or the substance or effect of the same only, be communicated (*ibid.*, s. 8).

(*m*) *Ibid.*, s. 1 (1) (c).

(*n*) *Ibid.*, s. 1 (2).

SECT. 1. In General.

term not less than five years, or to imprisonment for any term not exceeding two years with or without hard labour, who commits any act constituting a misdemeanour (*o*), if he intended to communicate to a foreign State any information, document, sketch, plan, model, or knowledge obtained or taken by him, or intrusted to him as aforesaid, or if he communicates the same to any agent of a foreign State (*p*).

Breaches of official trust.

47. Any person who by means of his holding or having held an office under the Sovereign (*q*) has lawfully or unlawfully obtained possession of or control over any document, sketch, plan, or model, or acquired any information, and at any time corruptly or contrary to his official duty communicates or attempts to communicate the same or any of them to any person to whom the same ought not in the interest of the State, or otherwise in the public interest, to be communicated at that time, is guilty of a breach of official trust (*r*).

Punishment.

If the communication was made or attempted to be made to a foreign State, the official breach of trust constitutes a felony, punishable on conviction (at the discretion of the court) by penal servitude for life, or for any term not less than five years, or to imprisonment for not more than two years with or without hard labour (*s*).

In any other case the breach of official trust constitutes a misdemeanour, punishable on conviction by imprisonment with or without hard labour for a term not exceeding one year, or by fine, or both (*t*).

48. Any person who incites or counsels or attempts to procure another person to commit an offence as enumerated in the foregoing paragraphs is guilty of a misdemeanour and punishable on conviction as if he had committed the offence (*u*).

An indictment for conspiracy to incite, and for inciting and attempting to procure a person employed by persons holding a contract with the Government involving the duty of secrecy, must contain an averment that the person incited etc. has by means of his office either obtained possession or control over the documents, or has acquired the information (*a*).

(*o*) See p. 31, *ante*.

(*p*) Official Secrets Act, 1889 (52 & 53 Vict. c. 52), s. 1 (3).

(*q*) "Office under the Sovereign" includes any office or employment in or under any Government department of the United Kingdom, and, so far as regards any document, sketch, plan, model, or information relating to the naval or military affairs of His Majesty, includes any office or employment in or under any Government department of any of His Majesty's possessions (*ibid.*, s. 8).

(*r*) *Ibid.*, s. 2 (1). The provisions of the section are to apply to a person holding a contract with any department of the Government of the United Kingdom, or with the holder of any office under the Sovereign as such holder, where the contract involves an obligation of secrecy; also to any person employed by any person or body of persons holding such a contract who is under a like obligation of secrecy, as if the person holding the contract and the person so employed were respectively holders of an office under the Sovereign (*ibid.*, s. 2 (3)).

(*s*) *Ibid.*, s. 2 (2) (a).

(*t*) *Ibid.*, s. 2 (2) (b).

(*u*) *Ibid.*, s. 3.

(*a*) *R.* v. *Stuart* (1899), 63 J. P. 712.

49. Unless suspended by Order in Council as to any British possession, or part of the same, under the power conferred by the Act (*b*), the provisions of the Official Secrets Act, 1889, apply to offences under the Act when committed in any part of the dominions of the Crown or when committed by British officers or subjects elsewhere (*c*).

Prosecution of offences.

50. Prosecutions for the foregoing offences are not to be instituted except with the consent of the Attorney-General (*d*).

The expenses of the prosecution of a misdemeanour under the Act are to be defrayed in like manner as in the case of a felony (*e*).

An offence under the Act is not to be tried by any court of general or quarter sessions, nor by the sheriff court in Scotland, nor by any court out of the United Kingdom not having jurisdiction to try crimes involving the greatest punishment allowed by law (*f*). Special provision is made for the trial of offences committed out of the United Kingdom (*g*).

The provisions of the Criminal Law and Procedure (Ireland) Act, 1887, do not apply to any trial under the provisions of the Official Secrets Act, 1889 (*h*).

Construction of the Official Secrets Act, 1889.

51. The Official Secrets Act, 1889, is not to exempt any person from any proceeding for an offence punishable at common law, or by military or naval law, or under any Act of Parliament other than the Act aforesaid, but no person may be punished twice for the same offence (*i*).

(*b*) This power may be exercised (under s. 5 of the Official Secrets Act, 1889 (52 & 53 Vict. c. 52)) as to any British possession in which (either on or after the 26th August, 1889) any law made by the legislature of the same appears to the Crown to be of the like effect as those contained in the Official Secrets Act, 1889 (52 & 53 Vict. c. 52), so long as such law continues in force there and no longer. The Order is to have effect as if enacted by the Official Secrets Act, 1889 (52 & 53 Vict. c. 52). The suspension is not to extend to the holder of an office under the Crown not appointed by the governor of the possession. British possession means any part of the British dominions not within the United Kingdom (*ibid.*, s. 5).

(*c*) *Ibid.*, ss. 5, 6 (1).

(*d*) *Ibid.*, s. 7 (1). "Attorney-General" means the Attorney or Solicitor General for England or for Ireland respectively, and as to Scotland the Lord Advocate. As to prosecutions in any court out of the United Kingdom, the person who in that court is Attorney-General or exercises the like functions as the Attorney-General in England (*ibid.*, s. 7 (2)). See, generally, title CRIMINAL LAW AND PROCEDURE.

(*e*) *Ibid.*, s. 4.

(*f*) *Ibid.*, s. 6 (3).

(*g*) By s. 6 (2), *ibid.*, namely, if the offence is alleged to have been committed out of the United Kingdom it may be tried and determined in any competent British court (see as to foreign jurisdiction, Vol. VI., pp. 448 *et seq.*) in the place where the offence was committed, or in the High Court in England or the Central Criminal Court. The Criminal Jurisdiction Act, 1802 (42 Geo. 3, c. 85) (see titles CRIMINAL LAW AND PROCEDURE; PUBLIC AUTHORITIES AND PUBLIC OFFICERS), is to apply as if the offence were mentioned therein and the Central Criminal Court and the High Court possessed the jurisdiction given by that Act to the Court of King's Bench (*ibid.*).

(*h*) *Ibid.*, s. 6 (4).

(*i*) *Ibid.*, s. 9.

SECT. 2. The Ministry and the Cabinet.

SECT. 2.—*The Ministry and the Cabinet.*

SUB-SECT. 1.—*Formation of the Ministry.*

The Prime Minister.

52. Upon the dismissal or resignation of an existing ministry (*k*), under the recognised constitutional practice the Sovereign summons to his presence the person whom he may consider most fitted for the purpose, and requests him to undertake the task of nominating the new ministry. Upon acceptance of this commission, and kissing the King's hands, the person so chosen becomes known as the Prime Minister or Premier, but his retention of that post is in practice dependent, in the first place, upon his ability to form a ministry (*l*).

Though nominally the Sovereign is unfettered in the choice of his ministers, and may summon whom he pleases to fill the office of Prime Minister, yet, owing to the dependence of the executive upon the support of the House of Commons (*m*), the choice of the Sovereign, except in unusual cases, is in practice restricted to one or other of the persons recognised by Parliament as the leaders of the party which commands a majority in the House of Commons (*n*). But, whether this rule is adhered to or not, it is generally conceded that the ministers of the Crown are, under the established usage, entitled to a fair trial, at least until it becomes clear that they are unable to obtain that support in the House of Commons which is necessary to enable them to carry on the executive government (*o*). And even where it is obvious that the

(*k*) As to the dismissal or retirement of ministries generally, see pp. 49 *et seq.*, *post*.

(*l*) *E.g.*, Lord Granville failed to form a ministry in 1859 (see Political History of England, Vol. XII., 174).

(*m*) Though nominally the Crown has the free choice of the Premier (see *per* Sir R. Peel, Parliamentary Debates, 3rd series, Vol. LXXXIII., 1004, and Parliamentary History, Vol. XXXV., 960, 962; and *per* Sir William Grant, Parliamentary Debates, Vol. IX., 474), in practice the choice is limited to the person trusted by the majority of the House of Commons. The necessity for this choice is imposed upon the Crown by the power of Parliament to defeat the practical administration of public government by cutting off supplies (see Vol. VI., p. 383). The House of Commons has, it is said, the right of advising the Sovereign as to the unfitness of the ministry, or in case of urgency, but not so as to render the Sovereign accountable for the choice of ministers (see *per* Lord Selkirk, Parliamentary Debates, Vol. IX., 377; *per* Mr. Canning, Parliamentary Debates, Vol. XXIII., 267). As to addresses urging the appointment of a strong and efficient ministry, or indicating the character of a ministry desired by the House, see note (*c*), p. 35, *post*).

(*n*) There may be cases where the person to be selected is not obvious, as where there are two or more leading members of the same party, one of whom will not work under the other (*e.g.*, Lord Palmerston and Lord John Russell in 1859, when Lord Granville was selected, though on his failure to form a ministry the post of Premier was eventually filled by Lord Palmerston (see Political History of England, Vol. XII., 174)). In cases where the lines of division are vague, or majorities small, coalitions are sometimes resorted to (*e.g.*, the Whigs and Peelites under Lord Aberdeen in 1852).

(*o*) When Pitt was called to office in 1783 by George III., he had the confidence of the King and of the House of Lords, but not of the majority of the House of Commons. In 1801, when George III. replaced Pitt by Addington contrary to the wishes of the majority in the Commons, it was recognised that the King has the sole right of appointing ministers, and that the latter are entitled at the outset to the constitutional confidence of the House.

ministry do not command the confidence of the House of Commons, it is customary for the latter to extend such support by granting supplies, or otherwise, as may be necessary to enable the executive government of the country to be carried on in a manner becoming to the dignity of the nation until the sense of the electorate can conveniently be taken upon a dissolution, or until a new ministry can be formed which commands the requisite majority (*a*).

No stated rule exists as to the time which may elapse between the dissolution of an existing ministry and the appointment of a new one. But the royal summons to the new Prime Minister is invariably made within the space of a few days (*b*), and any unreasonable delay on the part of the Crown is viewed unfavourably by Parliament (*c*).

Status of the Prime Minister.

53. Acceptance of the post of Prime Minister entitles the holder to place and precedence next after the Archbishop of York (*d*), but not to any special salary (*e*). The office is not recognised in terms either by the common or statute law, nor does it entail any specific legal duties, privileges, or disabilities (*f*). By

(*a*) When the Government is in a minority, dissolution or resignation is the recognised procedure, but in the case of dissolution, which the ministry have an undoubted right to advise (see *per* Lord Palmerston, Parliamentary Debates, 3rd series, Vol. CLIII., 1415), the House of Commons must make itself a party to the transaction by accelerating proceedings, and concurring in temporary measures, so as not to render that course inconvenient (*ibid.*, 1310—1311).

(*b*) According to Todd, changes of ministry under ordinary circumstances should be effected within a week (Todd, Parliamentary Government, Vol. I., p. 216). But (*semble*) no definite time can be laid down, provided the Sovereign does not delay unnecessarily.

(*c*) Upon various occasions where delay has occurred, Parliament has taken measures to address the Sovereign, requesting him to form a strong and efficient ministry, or indicating the character of the ministry desired by the House of Commons.

(*d*) This rank was conferred upon the then existing Prime Minister, and all future Prime Ministers by royal warrant of 2nd December, 1905 (see the *London Gazette* of that date). The warrant is noticeable as containing an official recognition of the office of Prime Minister. The only earlier official reference appears to be the Treaty of Berlin, in which Lord Beaconsfield described himself as Prime Minister (see Anson, Law and Custom of the Constitution, 3rd ed., Vol. II., 127).

(*e*) As First Lord of the Treasury (see note (*i*), p. 36, *post*) he, however, draws a salary of £5,000 per annum. The office of Lord Privy Seal, which is sometimes held by him, is now unsalaried. The Prime Minister also enjoys the use of the official residence in Downing Street.

(*f*) The occurrence of the term "first" or "Prime" Minister is to be found as early as the Tudor period, though, owing to the greater ascendency of the Crown, his position and powers differed widely from those of the Prime Minister of the present day (see Todd, Parliamentary Government, Vol. II., 119). As at present understood, his office originated with, and was rendered necessary by, the absence of the King at meetings of the Cabinet, and consequent non-participation in the conduct of public affairs, which dates from the accession of George I. (see *ibid.*, Vol. II., 120, and as to the withdrawal of the King from the Cabinet, note (*e*), p. 45, *post*). Under William III. there was usually a "chief adviser" of the Crown on matters of administration and legislation, but the King himself was the actual head of his ministries, and the only bond of union between their members (Macaulay, History of England, Vol. III., 13, 538; Vol. IV., 443; Todd, Parliamentary Government, Vol. II., p. 120). The ascendency of Walpole, who sat in the House of Commons as First Lord of the Treasury from 1715 to 1717, and from 1721 to 1742, is the first real illustration of the position occupied

SECT. 2. The Ministry and the Cabinet.

conventional usage, however, the Prime Minister is invariably a member either of the House of Commons or of the House of Lords (*g*), and a Privy Councillor (*h*), and usually holds the office of First Lord of the Treasury, or one or other of the more important executive offices (*i*). Moreover, his special duties and privileges, and his relations with the Crown, the Cabinet, and Parliament, are sufficiently clearly defined by recognised usage and practice (*k*).

The Ministry.

54. Under the established usage the Prime Minister is entitled to choose his colleagues who compose the ministry (*l*), and he accordingly submits their names for approval to the Crown.

by a modern Prime Minister, though the title was resented by him (*ibid.*, 119, 120; Macaulay, History of England, Vol. III., 13; Parliamentary History, Vol. XI., 1287, note), and, owing to the dislike occasioned by his personal ascendency, attempts were made to dismiss him by an address to the Crown and by impeachment, which, however, failed (see Parliamentary History, Vol. XI., 1083, 1126, 1215, 1303; Mahon, History of England, Vol. III., 101—155). As to the protest recorded in the Lords on the same occasion that "a sole or even a first minister is unknown to the law of Britain," see Parliamentary History, Vol. XI., 1215. The conduct of the administration with reference to the wishes of the House of Commons originated with Walpole, but the general acceptance of the Premier's status and position as at present understood dates from the leadership of Pitt in 1783 (Todd, Parliamentary Government in England, Vol. II., 119, 120). The term "Prime Minister" and the office itself are still unrecognised by substantive law (*ibid.*, Vol. II., 139), and it has been said that their recognition in an Act of Parliament would be unconstitutional (*per* Lord Lansdowne in 1829, *ibid.*). The term "Prime Minister" in its more modern sense is said to occur first in the writings of Swift, *temp.* Anne (see Anson, Law and Custom of the Constitution, 3rd ed., Vol. II., 114), and now the Warrant of 1905 (see note (*d*) on p. 35) may be regarded as officially recognising the use of the term.

(*g*) The person selected is preferably a member of the House of Commons as being more in touch with his colleagues and with the House of Commons itself. But numerous instances have occurred where the person obviously recognised as the leader of the predominant party in the Commons was a member of the House of Lords, and was selected by the Crown to form a Ministry, *e.g.*, Lord Derby, 1852, 1858, 1866; Lord Aberdeen, 1852; Lord Russell, 1865; Lord Salisbury, 1885, 1886, 1895; Lord Rosebery, 1894.

(*h*) All members of the Cabinet are invariably Privy Councillors (see p. 43, *post*).

(*i*) The Prime Minister is now usually First Lord of the Treasury, and sometimes Lord Privy Seal, though the offices vary, *e.g.*, Mr. Gladstone, 1892–4, Mr. Balfour, 1902, First Lord of the Treasury and Lord Privy Seal; Mr. Balfour, 1903, First Lord of the Treasury; Sir H. Campbell-Bannerman, 1905, Mr. Asquith, 1908, First Lord of the Treasury; Lord Rosebery, 1894-5, First Lord of the Treasury and Lord President of the Council. The duties of these offices being for the most part nominal, the Prime Minister can devote all his time and energies to party and parliamentary duties. Where the Premier is a member of the House of Lords, one of the more arduous posts is sometimes filled by him, *e.g.*, Lord Salisbury, 1885, 1886, 1895, filled the office of Foreign Secretary (as to the second Salisbury Cabinet, from 1886 to 1892, succeeding to that office on the resignation of Lord Iddesleigh in December, 1886). The office of First Lord of the Treasury has usually been associated with that of Prime Minister since 1806 (Todd, Parliamentary Government, Vol. II., 140).

(*k*) See, as to these, pp. 37 *et seq.*, *post*.

(*l*) The recognition of this doctrine has been gradual. Under the Stuarts, and even after 1688 under William III., ministers were chosen arbitrarily by the Sovereign. Under the first two Georges (1721—1742) Walpole was enabled to choose his colleagues owing to his personal ascendency, but the principle of free choice by the Premier was not recognised (see Todd, Parliamentary Government, Vol. II., 119, 120). During the reigns of the first three Georges the Whigs claimed both the nomination of the Prime Minister and to limit the

Except in the case of coalition ministries, when, owing to the break-up of political parties, the selection of persons whose views are identical with regard to some national question of paramount importance, irrespective of their views upon minor questions and of the ordinary lines of party division, is the only means of forming a coherent administration (*m*), the names of the persons so submitted by the Prime Minister are chosen by him from amongst the adherents of the political party of which he is the central figure, and for whose policy he is principally responsible.

Principal officers of State.

55. With the Prime Minister the persons so selected fill the following offices: (1) Cabinet officers: * the Lord High Chancellor of Great Britain (*n*); * the Prime Minister; * the First Lord of the Treasury; * the Lord President of the Privy Council; * the Lord Privy Seal; * the First Lord of the Admiralty. His Majesty's principal Secretaries of State (*o*), namely: * the Home Secretary; * the Foreign Secretary; * the Secretary of State for War; * the Colonial Secretary; * the Secretary of State for India; ** the Chief Secretary for Ireland (*p*); * the Chancellor of the Exchequer; * the Chancellor of the Duchy of Lancaster; * the Secretary for Scotland; ** the Postmaster-General; * the President of the Board of Trade; * the President of the Local Government Board; ** the President of the Board of Agriculture and Fisheries; * the President of the Board of Education; ** the First Commissioner of Works and Public Buildings. Sometimes included in the Cabinet (*q*): the Lord Chancellor of Ireland and the Lord Lieutenant of Ireland.

Sovereign's choice of ministers to the leading Whig families (see *per* Mr. Pitt, Parliamentary History, Vol. XXVII., 772; Todd, Parliamentary Government, Vol. I., 218). This rule was broken through by George III., who exercised the right of nominating a portion of his various ministries, *e.g.*, Lord Thurlow as Lord Chancellor in 1782 (Parliamentary Debates, Vol. XXIII., 413), who continued a member owing to the King's favour until 1792 (Campbell, Lives of the Chancellors, 4th ed., Vol. VII., 267), but did not interfere with Pitt's administration, though on some occasions he expressed strong disapproval of the selection of members (Todd, Parliamentary Government, Vol. I., 218, 219). After the Reform Act of 1832 (Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45)), the principle of choice of colleagues by the Premier became recognised with Sir Robert Peel's administration in 1834 (*ibid.*, 219).

(*m*) Coalitions have usually been regarded with popular suspicion and distrust, and are now politically recognised as justifiable only under peculiar and exceptional circumstances, as for carrying out some measure or undertaking of national concern upon which men of all parties are agreed (Todd, Parliamentary Government, Vol. II., 126).

(*n*) The offices marked * are now held by Cabinet ministers, and are under the recent practice usually included.

(*o*) Officers marked ** are in the present Cabinet, but have not been invariably included in modern Cabinets.

(*p*) The Chief Secretary for Ireland appears to be usually excluded when the Lord Lieutenant is a member, and *vice versâ*, *e.g.*, the first and third Salisbury Cabinets, 1885-6 (portion of the period) and 1895—1902 (see Political History of England, Vol. XII., Appendix II.).

(*q*) For a list of the more recent Cabinets, see Political History of England, Vol. XII., Appendix II. The appointment of persons holding the office of archbishop, Commander-in-Chief (now abolished), or Lord Chief Justice, to be Cabinet ministers, is now clearly recognised as unconstitutional, though in the earlier period of Cabinet history they have occasionally been included. Thus,

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Other officers of State.

(2) Members of the ministry not in the Cabinet: Admiralty—First Sea Lord; Second Sea Lord; Third Sea Lord; Fourth Sea Lord; Civil Lord. Army Council—first military member, Chief of the General Staff; second military member, Adjutant-General of the Forces; third military member, Quartermaster-General; fourth military member, Master-General of Ordnance; civil member, Parliamentary Under-Secretary of State; finance member, Financial Secretary. Under-Secretaries of State to the Home Office, Foreign Office, War Office, Colonial Office, India Office, Board of Trade, Local Government Board, and Board of Education. Lords of the Treasury—three Junior Lords; Junior Lord unpaid (*r*). Parliamentary Secretaries to the Treasury, Board of Education, Admiralty, Board of Trade, and Local Government Board; the Paymaster General. Law officers of the Crown: England—the Attorney-General; the Solicitor-General. Scotland—the Lord Advocate; the Solicitor-General. Ireland—the Attorney-General; the Solicitor-General.

Retirement of officers on change of ministry.

56. In addition to the above members of the ministry properly so called, it is usual for the more important officers of the Household to retire on a change of ministry (*a*); but it is not customary for ambassadors and colonial governors, as to whom some fixity of tenure is desirable, to vacate their posts upon a change of government. Where such an officer has become pledged to pursue a certain line of policy, the Foreign Secretary will naturally consult with him to ascertain whether he is able to change his views (*b*).

the Archbishop of Canterbury was a member of Walpole's administration under George II., though not of the "interior council" (see Todd, Parliamentary Government, Vol. II., 160), and the Commander-in-Chief, General Conway, was a member of the Cabinet in 1770, and in 1782 (*ibid.*, 154). Lord Hardwicke in 1757 (for a period of four months) and Lord Mansfield both sat in the Cabinet as Lord Chief Justices (see *ibid.*, 157), whilst in 1806 Lord Chief Justice Ellenborough was made Lord President of the Council, with a seat in the Cabinet, by Lord Grenville. On the latter occasion resolutions were proposed in both Houses to the effect that it is highly expedient that the functions of a minister of state and a common law judge should be kept separate (see Commons' Journal, Vol. LXI., p. 76, 3rd March, 1806; Lords' Journal, Vol. XLV., p. 482, 3rd March, 1806). These resolutions were rejected, but it is now recognised that such appointments are open to grave constitutional objections (see May, Constitutional History, Vol. I., 103; Todd, Parliamentary Government, Vol. II., 159; 1 Bl. Com., 14th ed., 269).

(*r*) This post was created under statutory authority (Consolidated Fund Act, 1816 (56 Geo. 3, c. 98), s. 14), by which His Majesty is empowered to appoint two Commissioners to sit and act as such in addition to the number which might on the 1st July, 1816, be appointed to that office, the yearly salary of each of the additional Commissioners not to exceed that received by each of the said Commissioners. Whilst unpaid the holder of the office (not being an office of profit) is not debarred from sitting in the House of Commons; but if salaried, the holder would be barred, *semble*, under the Succession to the Crown Act, 1707 (6 Ann. c. 41; c. 7, Ruff.) (see p. 41, *post*). Deputies and clerks of the Treasury, except the Commissioners of the Treasury, the secretaries of the Treasury and of the Chancellor of the Exchequer, are expressly debarred from sitting in the House of Commons (House of Commons Disabilities Act, 1801 (41 Geo. 3, c. 52), s. 4; and see title PARLIAMENT).

(*a*) See as to these, p. 106, *post*.

(*b*) See Parliamentary Debates, 3rd series, Vol. CLXIX., 1940. Foreign policy being more or less continuous, it is not difficult for such officers to perform their duties under a new administration.

SUB-SECT. 2.—*General Status of the Ministry.*

SECT. 2. The Ministry and the Cabinet.

Appointment of ministers.

57. The manner in which individual ministers are appointed by the Crown differs as to the various offices (*c*), but it is customary for the members of a new administration to assemble at a meeting of the Privy Council held for that purpose, when, after being introduced to the Sovereign, the seals and symbols relating to the various offices (*d*) are handed to them, and their acceptance of office is indicated by kissing the King's hands (*e*). Certain of their number are also required to take the official oath as soon as may be after appointment (*f*).

Except where the official salaries are charged directly upon the Consolidated Fund, as in the case of the Lord Chancellor (*g*), the remuneration for the various ministerial offices is voted annually in the Estimates, and is therefore subject to criticism, variation, or disallowance by Parliament (*h*).

Need not be in Parliament.

58. Apart from the members of the Cabinet (*i*), four of the principal Secretaries of State (*k*), and the various parliamentary secretaries and under-secretaries (*l*), who are by recognised usage selected from the House of Commons or the House of Lords,

(*c*) See pp. 19 *et seq.*, *ante*.

(*d*) *E.g.*, the Great Seal, Privy, Exchequer, and secretarial seals.

(*e*) Todd, Parliamentary Government, Vol. II., 228.

(*f*) See p. 24, *ante*, and note (*f*), *ibid.*

(*g*) *E.g.*, the Lord Chancellor, who receives £6,000 per annum in this manner, whilst £4,000 in addition is borne on the vote for House of Lords offices (see note (*c*), p. 57, *post*). This appears to be the only case of a ministerial salary not included in the Estimates.

(*h*) In 1850 a select committee of the House of Commons sat to inquire into official salaries, and certain of them remain at the amounts then recommended (see Report of the Select Committee on Official Salaries, Parliamentary Papers, 1850, Vol. XV.).

(*i*) See p. 43, *post*, and the exception there noted.

(*k*) Not more than four of the principal Secretaries of State, nor more than four of their under-Secretaries, may sit in the House of Commons at the same time (Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 4). If, when four under-Secretaries are so sitting, any other member of the House of Commons accept the office of under-Secretary of State, his election becomes void and a new writ must be issued. The person whose election is avoided, and any person not being a member who holds the office of principal or under-Secretary of State, is incapable of being elected or of sitting whilst he holds such office, and four other principal or under-Secretaries, in either case, are sitting, but no longer. If at a general election more than the authorised number of principal or under Secretaries are elected, the election is not invalidated, but no one of them may sit or vote until the number of those holding similar offices is reduced by death, resignation, or otherwise to the number required by law. Sitting or voting in contravention of these provisions renders the person liable to a fine not exceeding £500 for every day he sits or votes (House of Commons Vacation of Seats Act, 1864 (27 & 28 Vict. c. 34), ss. 1, 2). Similar provisions are to apply in any other case where the number of persons holding any office, who may also sit and vote, is limited by statute (*ibid.*, s. 3). The number of Admiralty Commissioners who may sit is limited to five (Admiralty Act, 1832, 2 & 3 Will. 4, c. 40, s. 1).

(*l*) Four of the under-Secretaries of State only may sit in the House of Commons (see last note); but otherwise under-Secretaries are not debarred from sitting in Parliament (Todd, Parliamentary Government, Vol. II., 256, citing 2 Hatsell, Precedents of Parliament, 51, 61, note).

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members of the ministry are not necessarily members of either House of Parliament (*m*).

Effect of acceptance of office of profit under Crown.

59. If any person being chosen a member of the House of Commons accepts any office of profit from the Crown whilst he continues a member, his election is void, and a new writ is to issue for a new election as if he were dead. He is, however, capable of being again elected as if his previous election had not been avoided (*a*). This provision is generally accepted as being applicable only to such offices as are in the immediate patronage of the Crown (*b*), and though in terms it applies to any office of profit held under the Crown, whether created before or after the 25th October, 1705, in effect its operation is generally conceded to be limited to offices created prior to that date (*c*), unless expressly exempted from its operation (*d*).

Where, however, a person has been returned a member of Parliament since the acceptance by him of certain specified offices, the subsequent acceptance by him from the Crown of any other or others of such specified offices in lieu of and in succession to that or those formerly held by him does not vacate the seat (*e*).

(*m*) Acceptance of office in some cases disqualifies a person from being a member of the House of Commons either absolutely, or until he has been re-elected after such acceptance. For such disqualifications see (in addition to the following notes) Succession to the Crown Act, 1707 (6 Ann. c. 41; c. 7, Ruff.), ss. 25, 28; Crown Pensioners Disqualification Act, 1715 (1 Geo. 1, stat. 2, c. 56), ss. 1, 2; Rogers on Elections, 18th ed., Vol. II., p. 12; and, generally, title PARLIAMENT.

(*a*) Succession to the Crown Act, 1707 (6 Ann. c. 41; c. 7, Ruff.), s. 25.

(*b*) See Rogers on Elections, 8th ed., Vol. II., p. 11.

(*c*) If its effect were not so limited it would operate as a partial repeal of s. 24, by which all persons holding new offices of profit are debarred from sitting. See Rogers on Elections, Vol. II., p. 11, and title PARLIAMENT.

(*d*) The office of Paymaster General is not a new office (Paymaster General Act, 1835 (5 & 6 Will. 4, c. 35), s. 5), and if a person be a member of the House of Commons before becoming Paymaster General, acceptance of the office does not vacate his seat (Court of Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44), s. 4). See also title PARLIAMENT as to the exempted offices.

(*e*) Under the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 52, Sched. H, these offices are:—Lord High Treasurer, Commissioners of the Treasury, President of the Privy Council, Comptroller, Treasurer, and Vice-Chamberlain of His Majesty's Household, Equerry or Groom-in-Waiting on His Majesty, any Principal Secretary of State, Chancellor (Under Treasurer is also given in the Act) of the Exchequer, Paymaster-General (but see note (*d*), *supra*), Postmaster-General, Lord High Admiral and Commissioners for executing his office, Commissioner of Works and Public Buildings, President of the Board of Trade (given in the Act as President of the Committee of Privy Council for Trade and Plantations), Chief Secretary for Ireland, Commissioner for Administering the Poor Law Relief Acts in England (now the President of the Local Government Board; see the Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 4), Chancellor of the Duchy of Lancaster, Judge Advocate-General, Attorney and Solicitor General for England, and for Ireland, Lord Advocate and Solicitor-General for Scotland. Add the President of the Board of Agriculture and Fisheries (Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 8 (1)), and the President of the Board of Education (Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 8 (1)). The Vice-President of the Committee of Council on Education was included in Sched. H above, but that office has been abolished, and one of the Secretaries of the Board of Education is not

60. New offices may, in general, be created by the Crown as the requirements of the public service demand (*f*); but where a charge upon the public funds is thereby entailed the sanction of Parliament, either express or implied, is required (*g*).

Where commissioners are appointed for executing any office their numbers (in the absence of statutory authority (*h*)) may not be increased beyond the numbers existing prior to the commencement of the session in which the Succession to the Crown Act, 1707, was passed (*i*).

Tenure of office.

61. All members of the ministry hold their offices at the pleasure of the Crown, and are dismissible without cause assigned (*k*), and, under the recognised usage, the whole ministry retires from office collectively with the Cabinet upon a change of Government, when the various offices are placed at the disposal of the new Prime Minister (*l*).

SUB-SECT. 3.—*The Cabinet.*

Status of the Cabinet.

62. The smaller body of ministers who form the advisory council of the Crown and by whom the general policy of the executive, as also of the more important legislative measures introduced by the predominant party in the House of Commons, is decided, is known as the "Cabinet." This body is not recognised in terms either by the common or statute law; and the rules which regulate its formation, and its relations, when formed, with the Crown, Parliament, and the Prime Minister, depend upon the conventional usages which have sprung into existence since 1688 (*m*), and which have now for the most part become

by reason of his office to be incapable of election to or voting in the House of Commons (Board of Education Act, 1899 (62 & 63 Vict. c. 33), ss. 1 (3), 8 (2)). The provision as to the offices in Sched. H above is also repeated in the Representation of the People (Scotland) and (Ireland) Acts, 1868 (31 & 32 Vict. c. 48, s. 51; 31 & 32 Vict. c. 49, s. 11).

(*f*) See Vol. VI., p. 387.

(*g*) See Vol. VI., p. 380.

(*h*) By the Consolidated Fund Act, 1816 (56 Geo. 3, c. 98), s. 14, two additional Treasury Commissioners were authorised to be appointed, and to sit and act as such in addition to the number then (1st July, 1816) lawfully authorised, with a yearly salary not exceeding that received by the then commissioners, notwithstanding anything to the contrary contained in the Succession to the Crown Act, 1707 (6 Ann. c. 41; c. 7, Ruff.). As to the present appointment of an unpaid commissioner, see note (*r*), p. 38, *ante*.

(*i*) Succession to the Crown Act, 1707 (6 Ann. c. 41; c. 7, Ruff.), s. 26.

(*k*) As to the tenure of office of executive officers generally, see p. 22, *ante*,

(*l*) Todd, Parliamentary Government, Vol. II., 164. As to the origin of this practice, see note (*p*), p. 42, *post*.

(*m*) The Cabinet is a term still unknown to the law and unrecognised by any Act of Parliament (see Hallam, Constitutional History, Vol. III., 253; Macaulay, History of England, Vol. I., 211, 220; Todd, Parliamentary Government, Vol. II., 141). The House of Commons refused to allow the term Cabinet Council to appear in an address to the Crown in 1711 (see Parliamentary History, Vol. VI., 972), and in 1851 the recommendation of a committee of the House of Commons to give Cabinet ministers a right of priority in passing to the House of Lords when summoned by the latter was not approved by the Commons, because such functionaries were unknown to the constitution, and possessed no legal status as such (see Parliamentary Debates, 3rd series, Vol. CXVIII., 1927, 1939—47, 1960; Todd, Parliamentary Government, Vol. II., 141). Under Charles I. a tendency on the part of the Crown to consult

SECT. 2. The Ministry and the Cabinet.

settled constitutional principles, subject to the modifications rendered necessary by time and circumstances, or by actual changes in existing executive or legislative institutions (*n*).

Composition of the Cabinet.

63. The choice of the persons who are to comprise the Cabinet rests with the Prime Minister (*o*), and, though no legal restriction as to their numbers or qualifications exists, the status of Cabinet ministers is, under the modern practice, usually confined to the holders of some twenty-one offices, including that of Prime Minister (*p*). Persons not holding any office have, however,

with the more important members of the Privy Council first appeared, and the group of ministers selected indiscriminately by the Sovereign were known as the *Junto*, and under Charles II., in 1671, as the *Cabal* (from the initials of the five privy councillors, Clifford, Arlington, Buckingham, Ashley, and Lauderdale), and later as the *Cabinet* (because the members met secretly in the King's closet), which were all terms of reproach (see Hallam, Constitutional History, Vol. II., 505; Todd, Parliamentary Government, Vol. II., 115). The system was viewed unfavourably by Parliament owing to the uncertainty as to the persons from whom advice was sought, and the difficulty of fixing responsibility, and under William III. clauses were inserted in the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), directing that consultative functions should be restored to the Privy Council, and (in order to fix responsibility) that all resolutions come to there should be signed by the members present. These provisions were repealed before the Act came into force (statute (1705) 4 & 5 Ann. c. 20, ss. 27, 28; 4 Ann. c. 8, ss. 24, 25, Ruff.), since it was recognised that their effect would be completely to sever the executive from Parliament. Provision was, however, subsequently made, preventing holders of offices created after the 25th October, 1705, from serving in Parliament, and vacating the seats of members accepting any of the older offices of profit, though the latter were to be eligible for re-election (Succession to the Crown Act, 1707 (6 Ann. c. 41; c. 7, Ruff.)). These provisions are still in force (see p. 40, *ante*). The subsequent developments of the Cabinet are due principally to the withdrawal of the Crown from meetings of the Cabinet under George I., owing to that Sovereign's ignorance of the English language and customs, as also his lack of interest in them (see note (*e*), p. 45, *post*), and the complete establishment of party government after the Reform Act (Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45)).

(*n*) It will be noted that under the common law rule a particular custom must be immemorial (1 Bl. Com., 14th ed., 76, 77), legal memory commencing from the beginning of the reign of Richard I. (*an.* 1189); and that consequently, so long as this rule remains law, the constitutional doctrines relating to the Cabinet can never become law unless placed upon a statutory basis, the Cabinet dating its origin from 1688. It may, however, be said that the decisions arrived at in Parliament as to the constitutionality or otherwise of particular measures or Acts are as cogent and binding in the conduct of political affairs, as are legal decisions in ordinary conduct. It may also be said that the principles to be found embodied in historical precedents have become as firmly settled as the principles of the common law itself.

(*o*) See p. 36, *ante*, as to the choice of the ministry generally.

(*p*) For these offices, see p. 37, *ante*. The present practice is the result of an evolutionary progress since 1688. From 1688 to 1788 the Government was mainly conducted by independent departments, subject to the general superintendence of the Crown (Macaulay, History of England, Vol. III., 14). Informal meetings of the more influential ministers were, however, held, and under Anne the Cabinet met weekly, the Queen being generally present (Campbell, Lives of the Chancellors, 4th ed., Vol. V., 249). The number of regular or efficient Cabinet ministers was originally much smaller than at present, varying from six or seven members in the reign of George I. to fifteen or sixteen members in the middle of the nineteenth century (see Todd, Parliamentary Government, Vol. II., 151, 152). Whilst the Cabinet was in an evolutionary state, however, there was a larger outer circle of ministers who were occasionally summoned, and in 1782 there appear to have been three grades—(1) the ordinary Cabinet

occasionally been included in the Cabinet (*q*), and this practice appears to have been recognised by Parliament (*r*). Persons may also be summoned to attend Cabinet meetings for particular purposes, though not included in the number of Cabinet ministers (*s*).

Resignation of office on the part of a Cabinet minister is generally understood to involve retirement from the Cabinet, unless he be specially summoned to attend (*t*).

Cabinet ministers are, moreover, invariably members of the Privy Council, and must, it seems, be bound by a privy councillor's oath before they can enter the Cabinet (*a*). They are also, under the established usage, members either of the House of Commons or the House of Lords (*b*).

The members composing the Cabinet are well known, but no legal record is kept of their names (*c*).

with no substantive authority; (2) the Cabinet with circulation, namely, members intrusted with keys of the Cabinet boxes in which foreign despatches and other documents were sent round for perusal; (3) the Cabinet with circulation of documents, and the power of ordering private letters to be opened, which is ordinarily confined to Secretaries of State (see Todd, Parliamentary Government, Vol. II., 118). Eventually the outer circle dropped off, and the inner or efficient Cabinet only remained, though somewhat increased in numbers. The tendency of modern Cabinets appears to be towards increase of numbers.

(*q*) Numerous instances of this practice are to be found, *e.g.*, the Marquis Camden in 1812, the Earl of Mulgrave in 1820, the Duke of Wellington on various occasions, Lord John Russell 1855—1866, Lords Sidmouth and Harrowby after their resignation in 1827, the former for two years (see Todd, Parliamentary Government, Vol. II., 154, 155).

(*r*) See Parliamentary Debates, Vol. VI., 327; *ibid.*, 4th ser., Vol. CXLII., 864. The Cabinet being in its origin, and still in a sense, a committee of the Privy Council, in theory any privy councillor may be a member irrespective of any other office he may hold (see Parliamentary Debates, 4th series, Vol. CXLII., p. 864; Todd, Parliamentary Government, Vol. II., 155).

(*s*) Thus, members of the Army Council, a general, or the Attorney or Solicitor General, may be brought in to advise (see Parliamentary Debates, 4th series, Vol. CXLII., 863; *ibid.*, *per* the Earl of Halsbury, L.C., p. 865).

(*t*) In 1801 Lord Loughborough, L.C., continued to attend meetings of the Cabinet, and retained the key of the Cabinet boxes, after he had retired with Pitt's administration. It became necessary for Addington to intimate by letter that his presence was not required (see Campbell, Lives of the Chancellors, 4th ed., Vol. VIII., 197). For instances where attendance has been invited after resignation, see note (*q*), *supra*.

(*a*) Exception has been taken in Parliament to the inclusion of a person in the list of Cabinet ministers attending a council published in the public newspapers, before being made a privy councillor, namely, Lord Cawdor in 1905 when nominated to the office of First Lord of the Admiralty. His attendance was excused upon the ground that his presence was required during the discussion (see *per* Lord Lansdowne, Parliamentary Debates, 4th series, Vol. CXLII., p. 864). The published list is not official (see *ibid.*, *per* the Earl of Halsbury, L.C., 865). A list, which would, however, appear to be official, is published in the Parliamentary Debates. According to Hearn, Lord Bute was made a member of the Cabinet by George III. before being sworn (Hearn, Government of England, 2nd ed., 192); but see *contra*, Anson, Law and Custom of the Constitution, 3rd ed., Vol. II., p. 98, note (2)).

(*b*) Cabinet ministers, as a rule, are required to be members of Parliament (see Parliamentary Debates, Vol. IX., 287). An exception to this rule occurred when Mr. Gladstone sat in the second Peel Cabinet, from December, 1845, to July, 1846, without a seat in either House.

(*c*) Parliamentary Debates, Vol. VI., 309; *ibid.*, 4th series, Vol. CXLII., p. 865, and note (*a*), *supra*. After the year 1800 lists of the members of the various

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Meetings of the Cabinet.

64. Meetings of the Cabinet may, it seems, be summoned by any Cabinet minister, the usual course, however, being to apply to the Prime Minister, who causes the necessary summons to be sent round (*d*). Meetings are held as often as the state of public business requires; but, except in cases of special emergency, it is usual for the Cabinet to adjourn during the prorogation of Parliament between August and October (*e*). Meetings of the Cabinet may be held anywhere, as at the Premier's official residence in Downing Street, or in his private room at Westminster, or at the Foreign Office (*f*).

All the members of the Cabinet are not necessarily summoned to any particular meeting, and no quorum is necessary before conclusions may be arrived at (*g*), though when important questions have been fully matured it is usual for a full Cabinet to be convened in order to arrive at a final decision (*h*).

Functions of the Cabinet.

65. In ordinary matters of administration individual ministers manage their own departments independently of the Cabinet, subject to the control of the Treasury in matters of expenditure; but all questions involving new or important principles, or which are likely to evoke discussion in the House of Commons, are in practice invariably submitted either to the Prime Minister or the Cabinet (*i*); and it is generally conceded that the Prime Minister, whose authority is paramount, may make any subject a matter for discussion by the Cabinet.

Proceedings at meetings.

66. The deliberations of the Cabinet take place only in the presence of members of the Cabinet, except where other persons are summoned to assist with special knowledge or advice (*k*). The persons present (subject to the above exception) are therefore bound by the privy councillor's oath of secrecy not to divulge anything that may take place (*l*).

No official records of the proceedings of the Council are kept, though the decisions arrived at may be embodied in the form of written minutes to be communicated to the Sovereign by the Prime Minister. The final decisions of the Cabinet are carried into effect

Cabinets appeared in the Annual Register. They now appear in the Parliamentary Debates.

(*d*) See Report of the Sebastopol Committee, 1854—1855, Parliamentary Paper, Vol. IX., pt. 3, evidence of the Earl of Aberdeen, at p. 290.

(*e*) *Ibid.*, pt. 2, evidence of the Duke of Newcastle, at p. 205.

(*f*) Todd, Parliamentary Government, Vol. II., 189.

(*g*) See the evidence of the Duke of Newcastle before the Sebastopol Committee, 1854—1855 (Parliamentary Paper, Vol. IX., pt. 2, p. 205).

(*h*) Ministers with heavy departmental work, such as the Secretary of State for India, are frequently not consulted in the first instance as to measures which it is intended to submit to the full Cabinet (see Parliamentary Debates, 3rd series, Vol. CLXXXV., *per* Viscount Cranburne, at p. 1348), and the subjects for discussion at any particular meeting are frequently not announced, though members of the Cabinet are generally aware of what questions are likely to arise (see Report of Committee on Official Salaries, 1850, Parliamentary Paper, Vol. XV., Evidence, 1397, 1409; Todd, Parliamentary Government, Vol. II., 192).

(*i*) Report of Committee on the Board of Admiralty, 1861 (Parliamentary Paper, Vol. V., p. 168); Todd, Parliamentary Government, Vol. II., 193.

(*k*) See p. 43, *ante*.

(*l*) For the oath, see p. 52, *post*. The duty of secrecy applies equally to ex-Cabinet Ministers (see Todd, Parliamentary Government, Vol. II., 195).

either by individual ministers or by a formal Act of Parliament or an Order of the Privy Council (*m*).

At meetings of the Cabinet members meet nominally on an equal footing, and, though the views of the Prime Minister are entitled to the greatest weight, decisions are arrived at by the vote of the majority (*n*).

In case of an irreconcilable difference of opinion, the Prime Minister may require the resignation of any of his colleagues, or by himself resigning cause a general dissolution of the Ministry (*a*). Differences of opinion between individual ministers or departments are, it seems, usually settled by the Prime Minister, or the Cabinet (*b*).

The written memoranda, despatches, and other documents which are intended for perusal by members of the Cabinet are ordinarily circulated in Cabinet despatch boxes, of which each member has a master key (*c*), and occasionally documents so circulated are printed confidentially (*d*).

The Sovereign and the Cabinet.

67. Since the reign of George I. the Sovereign has ceased to attend meetings of the Cabinet, his place being taken by the Prime Minister (*e*). Moreover, the presence of the King at any meetings of his ministers where deliberations or discussions take place is now clearly recognised as being contrary to constitutional practice (*f*).

(*m*) See Todd, Parliamentary Government, Vol. II., 195, 196. There is no executive department which is supreme over all the others (except as to money matters, which are controlled by the Treasury).

(*n*) See Report of the Committee on the Board of Admiralty, 1861 (Parliamentary Paper, Vol. V., evidence of Sir F. T. Baring, at p. 168).

(*a*) See *ibid.* Whilst the position of the Cabinet and of the Prime Minister were in an evolutionary stage, the retirement of the latter did not necessarily cause a dissolution of the whole ministry. Thus the elder Pitt retired in 1761 owing to a difference of opinion with his colleagues as to the prosecution of war with Spain (see Mahon, History of England, Vol. IV., 361; Campbell, Lives of the Chief Justices, Vol. II., 457). Resignation of the Premier is now generally recognised as entailing the dissolution of the Ministry, or at least a redistribution of offices by his successor. As to the dismissal of individual ministers generally, see pp. 48, 49, *post.*

(*b*) See Report of the Committee on the Board of Admiralty, 1861 (Parliamentary Paper, Vol. V., *per* Sir J. S. Pakington, 184—186); Todd, Parliamentary Government, Vol. II., 193, 194.

(*c*) See Todd, Parliamentary Government, Vol. II., 197.

(*d*) See Parliamentary Debates, 3rd series, Vol. CLXVI., *per* Viscount Palmerston at p. 711.

(*e*) Until the reign of George I. the Sovereign attended at meetings of the Cabinet, and sometimes gave advice on his own initiative. Queen Anne presided weekly (see Hallam, Constitutional History, Vol. III., 314, 315; Todd, Parliamentary Government, Vol. II., 115). George I., being ignorant of the English language and customs and chiefly interested in Hanover, neglected to attend, the result being that his place was taken by the leading member of the Cabinet (see Hallam, Constitutional History, Vol. III., 388—390; Todd, Parliamentary Government, Vol. II., 115). Since George III. the absence of the Sovereign has been recognised as a constitutional principle (Todd, Parliamentary Government, *ante;* Hearn, Government of England, 2nd ed., 208), and only three instances of the presence of the Sovereign for merely formal purposes have been recorded since the accession of George I. (see Todd, Parliamentary Government, Vol. II., 115; Anson, Law and Custom of the Constitution, 3rd ed., Vol. II., p. 40, note 2).

(*f*) This doctrine was enunciated in Parliament by Lord Granville in 1864

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The decisions arrived at by the Ministry must, however, be communicated to the Sovereign, in order to afford him the opportunity of exercising that constitutional criticism with regard to all the departments of State to which he is entitled (*g*). The fullest information should also be given to him, both by the Cabinet and by individual ministers, as to the measures proposed to be taken in important matters; and drafts for the Sovereign's approval and signature, and the papers or despatches connected therewith, should be submitted in time to permit of his becoming fully acquainted with their nature before coming to a decision (*h*), the proper course being for all important documents and correspondence to be sent first to the Prime Minister, to be transmitted by him to the Sovereign, and afterwards circulated amongst members of the Cabinet. Any measure sanctioned by the Crown should not afterwards be arbitrarily altered or modified (*i*).

Advice should be unanimous.

68. The advice tendered to the Crown by the Cabinet ought to be unanimous, and it is unconstitutional for the Sovereign to inquire into the lines of division amongst members of the Government (*k*). If the Crown refuses to accept the advice so given, it is recognised that the Ministry must either revise their decision or resign (*l*). But until the resignation or dismissal of an existing Ministry and the formation of a new one, it is clearly unconstitutional for the Crown to seek advice elsewhere (*m*). Nor is it in general constitutional for the Sovereign to express his political views to any persons except his ministers, though he may listen to the views of others without commenting thereon, or act as a mediator in heated political quarrels (*n*).

Access to Sovereign.

69. The Prime Minister acts as the medium of communication between the Cabinet and the Crown, and the decisions arrived at are imparted by him to the Sovereign, either by letter or personal interview (*o*). Individual ministers have, however, the right of

with reference to the attendance of the Queen at a committee of the Privy Council (see Parliamentary Debates, 3rd series, Vol. CLXXV., 251).

(*g*) See Parliamentary Debates, 3rd series, Vol. CLXXXVIII., *per* Mr. Disraeli, at p. 1113.

(*h*) This is the substance of the detailed instruction sent by Queen Victoria to Lord Palmerston (then Foreign Secretary) through Lord John Russell, the then Prime Minister, in 1851 (see Parliamentary Debates, 3rd series, Vol. CXIX., 90).

(*i*) See Report of Committee on Official Salaries, 1850 (Parliamentary Paper, Vol. XV., evidence No. 326).

(*k*) Unanimity of advice and collective responsibility on the part of the Cabinet are correlative (see *per* Lord North, Parliamentary History, Vol. XXIV., 291; Vol. XXIII., 678). As to collective responsibility, see p. 47, *post*.

(*l*) See *per* Lord Grenville in 1807, Parliamentary Debates, Vol. IX., 239.

(*m*) George III. habitually took advice from persons not in the Cabinet, principally from Lord Bute, and the party which he attempted to form were known as "King's men," or the "King's friends." This "influence behind the Throne" was frequently denounced in Parliament (see Parliamentary Debates, Vol. XVI., 9; May, Constitutional History, Vol. I., 11, 12, 84, 88; Todd, Parliamentary Government, Vol. I., 49, 50). See also note (*n*), p. 7, *ante*, as to Mr. Dunning's resolution on the increase of the royal influence.

(*n*) Todd, Parliamentary Government, Vol. II., 202, 203, 205; May, Parliamentary Practice, ed. 1863, 314. As to the attempt made by George III. to influence the House of Lords, see note (*m*), *supra*.

(*o*) See *supra* as to the transmission of documents through the Premier.

access to the Sovereign at all times on matters connected with their own departments; but all such communications or correspondence should, it is said, be submitted to the Prime Minister, either beforehand or immediately afterwards (*p*).

The ministry have a constitutional right at all times to tender such advice to the Sovereign as they may think fit, and any attempt on the part of the latter to limit the scope or character of that advice, or to exact pledges as to future conduct, either on the formation of a ministry or by threats of dismissal, is clearly recognised by the House of Commons as unconstitutional (*q*). And in the case of the refusal of a ministry to comply with demands of this nature on the part of the Crown, and consequent dismissal or resignation, the new ministry would, it is apprehended, be held responsible by Parliament for the circumstances which led to the dissolution of the previous ministry (*r*).

Ministerial responsibility.

70. In addition to their legal liability for wrongful or criminal acts (*s*), and to their responsibility to the Crown for the conduct of the executive (*t*), the members of the ministry are jointly and severally responsible to Parliament for every legislative and executive act of the Crown (*a*), as also for every legislative measure

(*p*) See Todd, Parliamentary Government, Vol. II., 208.

(*q*) This principle was finally established in 1807, when George III. dismissed the Grenville ministry for recording in the minutes of the Council their right at any future time to submit their views upon the Catholic question, which, at the instance of the King, they had pledged themselves not to do. The King insisted on the withdrawal of the minute, and the substitution of a pledge not to make any proposals in favour of the Catholic claims. Resolutions were formulated in both Houses to the effect that it is contrary to the first duties of the confidential servants of the Crown to restrain themselves, by any pledge express or implied, from offering to the King any advice which circumstances may render necessary for the welfare of the kingdom. No direct vote was taken, though the principle was clearly admitted (see May, Constitutional History, Vol. I., 96, 97; Parliamentary Debates, Vol. IX., 285, 328-9, 335, 362, 380; Todd, Parliamentary Government, Vol. II., 147-8; Vol. I., 91).

(*r*) This principle was clearly enunciated in the debates upon the occurrence mentioned in the last note (see *per* Lord Selkirk, Parliamentary Debates, Vol. IX., 381; see also *ibid.*, Vol. XVI., 2, and note (*g*) on p. 49, *post*).

(*s*) See Vol. VI., pp. 383, 415.

(*t*) Though the powers of controlling ministers has in effect shifted from the Crown to Parliament since 1688, they are still dismissible at the pleasure of the Crown, and this right of dismissal may still be properly exercised in certain cases (see p. 49, *post*).

(*a*) From the latter half of the fourteenth century Parliament has attempted to make ministers responsible for the policy pursued by them by means of an impeachment. But an impeachment is a judicial proceeding; and therefore a man ought not to be convicted upon an impeachment unless guilty of some offence against the law. It does not follow that because a minister differs from Parliament as to the policy to be pursued by the State he is guilty of a crime. Therefore an impeachment, though an adequate remedy to secure the responsibility of ministers for illegal acts, was inadequate to secure their responsibility to Parliament for their policy. The failure of the Earl of Strafford's impeachment illustrates this; and the framers of the Grand Remonstrance (1641) hit the point when they asked the King (s. 197) only to employ ministers in whom Parliament could confide, and when they pointed out (ss. 198, 199) that the Commons might justly object to certain persons as ministers, "and yet not charge those men with crimes, for there be grounds of diffidence which lie not in proof"; and, "there are others [grounds of diffidence] which though they may be proved, yet are not legally criminal." These ideas were in advance of

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introduced in Parliament with the authority of the Government. For the Crown has no power to do any public act either in its legislative or executive capacity except through the medium of some minister who is held responsible (*b*), and it is constitutional and usual for Parliament to declare its opinions as to the exercise of the discretionary powers intrusted to the Crown by virtue of the prerogative (*c*).

The responsibility of each minister to the law may be enforced by impeachment, in bar of which a pardon or the orders of the Crown cannot be pleaded (*d*); and the responsibility of the ministry, individually and collectively, is secured by the fact that ministers are in effect dismissible at the pleasure of the House of Commons through their inability to carry on the government without its support (*e*). Moreover, unless disavowed by the Government, the act of an individual minister may result in the withdrawal of parliamentary confidence from the ministry as a whole, and the consequent necessity for their retirement from office; but it appears that the Cabinet does not necessarily hold itself responsible for the acts of every minister (*f*).

The responsibility of the ministry is not confined to executive or legislative acts of the Crown whilst it holds office, but

their age, and it was not till after 1688 that the gradual growth of the Cabinet system at length realised the ideas foreshadowed in 1641. In 1711 definite mention of the accountability of ministers for every executive act appears in a debate in Parliament (see Parliamentary History, Vol. VI., 972, 1083); but whilst the Crown continued to take an active part in politics, as in the case of the Partition Treaty of 1698, the doctrine could not be carried to its logical conclusion. The complete responsibility of ministers was again asserted in Parliament in 1739 (*per* the Duke of Argyle, Parliamentary History, Vol. X., 1138) and in 1741 (*per* Sir John Barnard, Parliamentary History, Vol. XI., 1268), but owing to the increase of royal influence under George III. the doctrine became unsettled. Thus in 1778 it was asserted in the Commons that the King was his own minister, and Fox lamented that His Majesty was his own unadvised minister (Todd, Parliamentary Government, Vol. I., 175). See also the forced retirement of Pitt in 1761, because he claimed to be responsible only to Parliament for his views as to the necessity for war with Spain (Mahon, History of England, Vol. IV., 240). The complete doctrine of ministerial responsibility to Parliament for every executive act of the Crown is to be found expressed in Parliament in 1807 on the occasion of the dismissal of the Grenville ministry for refusal to pledge themselves not to reintroduce the measure for the relief of Roman Catholics (see *per* Lord Selkirk, Parliamentary Debates, Vol. IX., 335, 381).

(*b*) See Parliamentary Debates, Vol. IX., *per* Lord Selkirk, at p. 381.

(*c*) See the resolution of the House of Commons in 1784 (Parliamentary History, Vol. XXIV., 534, 571).

(*d*) See Vol. VI., p. 381. As to impeachment generally, see title PARLIAMENT.

(*e*) In the reign of Anne the ministry did not stand and fall together. The first instance of resignation by the Premier in consequence of an adverse vote in Parliament is that of Walpole in 1742, but he was not accompanied by the whole of his colleagues (see Mahon, History of England, Vol. III., 101, 112; Todd, Parliamentary Government, Vol. II., 111, 112, 154). In 1782 the whole ministry retired with Lord North except Lord Thurlow (Knight, History of England, Vol. VI., 453; Todd, Parliamentary Government, Vol. II., 113). Since then, except in a few cases where individual ministers have remained in office through several administrations (*e.g.*, Lord Thurlow, L.C.; Lord Palmerston, Secretary at War, 1809—1828, Foreign Secretary, 1830—1834, 1835—1841), the ministry has retired collectively.

(*f*) *E.g.*, the Solicitor-General for Ireland in 1831 (Mirror of Parliament, 1831, 2312—2315; Todd, Parliamentary Government, Vol. II., 332).

may extend constructively to the circumstances which led to the dismissal or resignation of the previous ministry (*g*).

Unanimity of Cabinet.

71. In order to preserve the dignity of the nation, and the necessary appearance of unanimity which should be displayed by an efficient Government, both with regard to the advice given to the Sovereign in administrative and executive matters, as also to legislative measures in Parliament, upon all questions which have not been left open, it is recognised as being constitutionally necessary that individual ministers should in general support the decisions arrived at by the majority of the Cabinet (*h*). Failure to support his colleagues upon vital questions may render a minister liable to dismissal from office (*i*) ; but under the recognised practice, where an individual minister votes against his colleagues on a Government question in the House of Commons, it is usual for him to tender his resignation immediately in order to prevent the appearance of disunion in which the ministry would otherwise be involved (*k*). But where permission has been given to a minister by the Cabinet to vote against the Government upon a particular measure, resignation does not, it seems, necessarily follow (*l*).

SUB-SECT. 4.—*Dissolution of the Ministry.*

Dismissal of Ministers.

72. The Sovereign may legally dissolve the ministry at any time by dismissal ; but the exercise of this power in order to assert the personal wishes of the Sovereign in opposition to the wishes of Parliament, and ultimately of the electorate, is clearly recognised as unconstitutional (*m*) ; though in cases where the ministry still retains the confidence of the House of Commons, but the Crown has reason to believe that the latter no longer represents the sense of the electorate, the dismissal of the ministry, or the dissolution of

(*g*) This principle was clearly recognised in 1807, when the Grenville ministry was dismissed by George III. for refusing to pledge themselves on the Roman Catholic relief question (see Parliamentary Debates, Vol. IX., 335 ; *ibid.*, *per* Lord Selkirk, 381 ; and see note (*q*) on p. 47, *ante*). The principle of responsibility for events which lead up to acceptance of office was fully admitted by Sir Robert Peel in 1834, when he took over the administration from the Duke of Wellington (see Parliamentary Debates, 3rd series, Vol. XXVI., 216, 223).

(*h*) See Parliamenary Debates, 3rd series, Vol. CXXVI., 883. The unanimity of the ministry is the necessary corollary of collective responsibility, and originated contemporaneously. It is now fully recognised that, though individual members may retire without causing the downfall of the ministry, on vital questions the ministry as a whole must stand or fall as one man.

(*i*) Individual ministers must bow to the decision of the majority, or leave to the Crown that full liberty, which the Crown must possess, of no longer continuing the minister in office (see *per* Lord John Russell, Parliamentary Debates, 3rd series, Vol. CXIX., 90).

(*k*) Todd, Parliamentary Government, Vol. II., 329.

(*l*) Thus, when Mr. Baines voted against the Government on the repeal of the navigation laws in 1849, his continued presence in the ministry was excused on the ground that he had made that a condition of acceptance of office (see Parliamentary Debates, 3rd series, Vol. CII., 681).

(*m*) Under the modern Cabinet system attempts on the part of the Crown to thwart the wishes of Parliament by the dismissal of the ministry have invariably proved unsuccessful, unless upon a dissolution the country has shown itself opposed to the policy of the former Parliament and Administration.

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Parliament, would be constitutional; and cases of emergency might conceivably arise where, through the unfitness or incapacity of the ministry, the exercise of the power of dismissal would be constitutional, justifiable and proper, in order to prevent the adoption of some course of action ruinous to the nation (*n*).

It is, however, a clearly recognised constitutional principle, that, though in dismissing his councillors the King may seem to be acting independently and without advice, there is no act of the Crown relating to public government for which some person is not responsible to Parliament, and that in all cases the incoming ministry are constructively responsible for the dismissal of their predecessors (*o*).

Under the modern usage, though nominally dismissible by the Crown, the ministry are in reality dependent upon the goodwill of the House of Commons for their continuance in office, and the exercise of the power of dismissal is rarely required (*p*). An adverse vote in the House of Commons upon a Government measure may be said to be invariably followed by resignation of the ministry or an appeal to the electorate by dissolution (*q*).

The continuance of the ministry in office is also dependent ultimately upon the goodwill of the electorate, and where upon a dissolution the latter declares itself against the Government by returning a majority opposed to its policy, it is usual for the ministry either to resign immediately or to await an adverse vote in the new Parliament. In some instances, however, the resignation has been deferred until Parliament has met and a vote of want of confidence been passed (*r*).

(*n*) The Crown, it has been said, is justified in dismissing a ministry in whom it feels unable to repose confidence or for want of ability or unfitness (see Parliamentary History, Vol. XXXV., *per* Mr. Pitt, at p. 1121; Parliamentary Debates, Vol. IX., *per* Lord Selkirk, at p. 377), or where their existence in office is through dissensions or otherwise ruinous to the country (see *per* Lord Brougham, Mirror of Parliament, 1835, 28, 29).

(*o*) See the debates on the circumstances which led to the dismissal of the Grenville ministry in 1807 (Parliamentary Debates, Vol. IX., 328, 329, 335, 362, 381, and pp. 48, 49, *ante*).

(*p*) Since 1841, except in the cases of the reorganisation of the ministry in 1865 and 1908, owing to the death of the Premiers (Lord Palmerston and Sir Henry Campbell-Bannerman respectively), the dissolution of a ministry has been invariably due to a defeat in the House of Commons or at the polls.

(*q*) The first example of the resignation of a Prime Minister in consequence of an adverse vote was that of Walpole in 1742 (see Mahon, History of England, Vol. III., 111, 112, 114).

(*r*) This principle was marked in 1868 by the resignation of the third Derby and first Disraeli administration upon an adverse verdict at the polls without meeting Parliament (see Political History of England, Vol. XII., 220). Of the subsequent ministries three (namely, the first Gladstone ministry in 1874, the second Disraeli ministry in 1880, and the third Gladstone ministry in 1886) retired immediately upon an adverse verdict at the polls (see *ibid.*, Vol. XII., 259, 300, 387), whilst three (namely, the first and second Salisbury ministries in 1886 and 1892 and the Balfour ministry in 1905), though returned in a minority, awaited a vote of want of confidence before resignation (see, as to Salisbury ministries, Political History of England, Vol. XII., 375, 416). The remaining two (namely, the second Gladstone ministry in 1885 and the fourth Gladstone, afterwards the Rosebery, ministry in 1895) retired upon defeat of a Government measure (see *ibid.*, Vol. XII., 365, 367, 429).

73. The death, resignation, or dismissal of the Premier may in general be regarded as equivalent to a dissolution of the existing administration (*a*), though it does not necessarily involve the shifting of the government from one political party to another; and, though the other members of the ministry do not necessarily retire upon the death or resignation of the Premier, their offices are in practice invariably placed at the disposal of his successor, who may change or reconstruct the administration as he thinks fit (*b*).

SECT. 3.—*The Privy Council.*

The Privy Council.

74. Since the year 1707 there has been one Privy Council for Great Britain (*c*), and also since the year 1801 a separate Privy Council for Ireland (*d*), but not for Scotland; and, unless the contrary intention appears, the use of the term "Privy Council" in statutes, except when used with reference to Ireland only, means the Lords and others for the time being of His Majesty's Most Honourable Privy Council, and when used with reference to Ireland only the Privy Council for Ireland for the time being (*e*).

Privy Councillors.

75. The Privy Council is composed of an unlimited number of persons, appointed solely at the pleasure of the Crown without formal grant or letters patent, and no previous qualification is in general legally necessary. But, unless naturalised under the Naturalization Act, 1870 (*f*), no persons born out of the kingdoms of England, Scotland, or Ireland, or the dominions belonging thereto, although made a denizen (*g*), except such as are born of English parents, are capable of becoming Privy Councillors (*h*).

(*a*) See Todd, Parliamentary Government, Vol. II., 226.

(*b*) *E.g.*, the reconstructed ministries on the death of Lord Palmerston in 1865 (see *ibid.*, Vol. I., 158, 159) and in 1908 on the death of Sir Henry Campbell-Bannerman. The elder Pitt in 1761 affords an example of the enforced retirement of a Premier owing to disagreement with his colleagues without involving the downfall of the rest of the Cabinet. In 1894, when Mr. Gladstone retired owing to failing health, the administration was taken over by Lord Rosebery without any general dissolution (see Political History of England, Vol. XII., 424).

(*c*) Union with Scotland (Amendment) Act, 1707 (6 Ann. c. 40; c. 6, Ruff.), s. 1. The Privy Council for Great Britain is to exercise the same powers and authorities as the Privy Council for England lawfully had at the time of the Union, and none other (*ibid.*).

(*d*) Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), arts. 1, 8, s. 3. By the latter section His Majesty may, so long as he shall think fit, continue the Privy Council of Ireland to be his Privy Council for that part of the United Kingdom called Ireland.

(*e*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12 (5).

(*f*) 33 & 34 Vict. c. 14. Persons naturalised were disqualified by the Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), but s. 7 of the Naturalization Act, 1870 (33 & 34 Vict. c. 14), confers upon persons naturalised under the Act all political and other rights, powers, and privileges of a natural-born British subject, except when within the limits of his own country, unless he has ceased to be a subject of such country under the laws of the same. See title ALIENS, Vol I., p. 301.

(*g*) By the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 13, nothing in that Act is to affect the grant of letters of denization by His Majesty.

(*h*) Act of Settlement, 1700 (12 & 13 Will. 3, c. 2), s. 3.

SECT. 3. The Privy Council.

The members of the Council (which at present comprises some two hundred and ninety persons) are invariably chosen by the Crown from amongst noblemen of high rank, persons who have held or hold high political, judicial, or ecclesiastical office, distinguished colonial politicians, or persons eminent in science or letters; and the near relatives of the Sovereign (*i*), the archbishops (*j*), the Prime Minister, the Lord Chancellor, the Speaker of the House of Commons, the Bishop of London, Cabinet ministers, great officers of State and of the Household, the four Lords of Appeal in ordinary, the Lord Chief Justice, and the Lords Justices of Appeal, are from the nature of their position or offices generally understood to have a prescriptive claim to appointment (*k*).

Precedence of Privy Councillors.

76. Privy councillors are called to office by the Sovereign's invitation, and after taking the oath of allegiance (*l*) and the privy councillor's oath (*m*), or an affirmation in lieu of either of these oaths (*n*), their names are inscribed in the Council book.

Privy councillors enjoy no special salary or emoluments, but are entitled to the style of "Right Honourable," and to precedence, with Knights of the Garter and of St. Patrick, next after the eldest sons of barons (*o*). Their names are now invariably placed upon the commission of the peace for every county in England (*p*).

The office of privy councillor is not affected by the demise

(*i*) The King's sons, it is said, are members by birth (Anson, Law and Custom of the Constitution, 3rd ed., Vol. II., 139, note (3), citing Greville, Memoirs, Vol. IV., 274). Near relatives of the Sovereign, *semble*, are not necessarily required to take the privy councillor's oath (Todd, Parliamentary Government, Vol. II., 55, note (h), citing Haydn, Book of Dignities, 120, 129, 137, 145).

(*j*) The Archbishops of Canterbury and York claim, it is said, to be members by prescriptive right (see Todd, Parliamentary Government, Vol. II., 161).

(*k*) See Todd, Parliamentary Government, Vol. II., 54.

(*l*) In the form provided by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 2; see *ibid.*, s. 14 (2).

(*m*) For the form of the oath, see Report of the Oaths Committee (Parliamentary Paper, 1867, Vol. XXXI., p. 84), where a form of declaration recommended in place of the oath is given. The substance of the oath is—(1) to be true and faithful servants of the Crown; (2) not to countenance any word or deed against the Sovereign, but to withstand the same to the utmost of his power, and to reveal it to the Sovereign or the Privy Council; (3) to declare his true and faithful opinion upon all matters before the Council; (4) to keep secret all matters revealed or treated of in the Council; (5) not to reveal matters so treated of touching any of his colleagues without the consent of the Sovereign or the Council; (6) to bear faith and allegiance to the Crown, and to defend its jurisdiction and powers against all foreign princes, persons, prelates, States, or potentates; (7) generally to act in all things as true and faithful servants of the Crown.

(*n*) Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 1. The form of affirmation is given in s. 2. See also p. 24, *ante*. Nothing in the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), is to affect the privy councillor's oath, except that the oath of allegiance is to be taken in the form prescribed by that Act in lieu of the oath of allegiance, supremacy, and abjuration (*ibid.*, s. 14 (2)).

(*o*) Conferred by letters patent of 9, 10, and 14 Jac. 1.

(*p*) Individual councillors and the Privy Council itself formerly claimed the power of committing to prison without cause shown, and this power was confirmed by an opinion of eleven judges in 1591 (see Hallam, Constitutional History, 3rd ed., Vol. I., 317—320). The jurisdiction usurped by the Privy Council, and exercised principally by the Star Chamber, was abolished by statute of 1640 (16 Car. 1, c. 10). The inclusion of councillors in the commission of

of the Crown (*q*), and members of the House of Commons do not vacate their seats upon appointment (*r*). Privy councillors are dismissible at the pleasure of the Sovereign simply by the striking of their names off the Council book (*s*), and may resign at any time without incurring his displeasure (*t*).

Meetings of Privy Council.

77. Meetings of the Council itself, or of committees of the Council, are summoned (*a*) by the Clerk of the Council in Ordinary (*b*), and at the former the King presides in person, the Lord President of the Council (who is appointed simply by declaration of the King in Council) being seated on his right (*c*).

At meetings of committees of the Council (the form of summons to which differs somewhat from the ordinary form (*d*)) the King is not present (*e*). Committees of the Council may be appointed by the Crown at any time to advise upon particular questions, and in addition to the Judicial Committee, by which the appellate jurisdiction of the Council is now exercised (*f*), there are

the peace now enables commitments to be made by any of their number, but not so as to interfere with the right of *habeas corpus*.

(*q*) Demise of the Crown Act, 1901 (1 Edw. 7, c. 5), s. 1; and see Vol. VI., p. 384.

(*r*) See Parliamentary Debates, 3rd series, Vol. CLXXIV., 1197, where it is stated that it is customary for a new writ to be issued on the vacation of a seat by acceptance of an office of profit, before admission to the Privy Council.

(*s*) Councillors were frequently so dismissed in earlier periods of history. Thus the Duke of Devonshire's name was struck off by George III. in 1762, and Fox was struck off in 1798, on the advice of Pitt, for a seditious speech, though he was subsequently reinstated in 1806 upon the advice of Lord Grenville (Todd, Parliamentary Government, Vol. II., 53, note (b), citing Haydn, Book of Dignities).

(*t*) This principle was recognised as early as the year 1406 by Henry IV. (see Nicolas, Proceedings of the Privy Council, Vol. VI., Preface, p. cxlvii.), and on that occasion Lord Lovell was excused from attendance, on the ground that he could not serve *honestement* because of suits pending (*ibid.*, note (b)).

(*a*) In the case of an ordinary council the summons runs, "Let the messenger acquaint the lords and others of His Majesty's most honourable Privy Council that a council is appointed to meet at the court at on ." In the case of a committee meeting, the summons is directed to the lords of the Council, informing them that a committee of their lordships is appointed to meet at the Council Chamber, Whitehall.

(*b*) By the Clerk of the Council Act, 1859 (22 & 23 Vict. c. 1), s. 1, a deputy may be appointed in the absence of the Clerk of the Council in Ordinary subject to provisions to be made by Order in Council, and the acts of the deputy are to be valid in all respects as the acts of the Clerk in Ordinary himself. The oaths to be taken by the Clerk of the Council and the Keeper of the Council Chamber, for which declarations are recommended to be substituted, are given in the Report of the Oaths Committee, 1867 (Parliamentary Paper, 1867, Vol. XXXI., p. 85). Declarations may be made in place of an oath under the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72) (see p. 26, *ante*).

(*c*) This appears to be the present practice (see Anson, Law and Custom of the Constitution, 3rd ed., Vol. II.), though formerly, it seems, the Chancellor sat on the right, and the President on the left (see Todd, Parliamentary Government, Vol. II., 58, 59).

(*d*) See note (*a*), *supra*.

(*e*) The presence of the Sovereign at committees of the Council where deliberations or consultations take place is now fully recognised as unconstitutional (see *per* the Earl of Granville in 1864, Parliamentary Debates, 3rd series, Vol. CLXXV., 251).

(*f*) This committee was formed in 1833 by the Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41). As to its present constitution, see title COURTS.

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certain standing committees to advise on matters connected with the universities of Cambridge and Oxford, Scottish universities, constitutional questions affecting the Channel Islands, and grants of charters for municipal corporations (*g*). The Board of Trade is also technically a committee of the Privy Council (*h*).

Except where they are empowered to act without reference to the Council itself, the advice given by committees of the Council is eventually embodied in formal orders, and these and all other formal acts of the Council, expressed either in the form of Orders in Council or proclamations, are authenticated by the signature of the Clerk of the Council.

Jurisdiction.

78. The questions to which the orders or proclamations issued by the Privy Council relate embrace administrative and executive matters falling within the powers intrusted to the discretionary authority of the Sovereign by virtue of the prerogative, whilst in the exercise of the manifold powers intrusted to it by statute the Council acts to a large extent as a secondary legislative chamber subordinate to Parliament (*i*). But, though the orders issued by the Council are still expressed to be made by the Crown with the advice of the Privy Council, the Council itself has ceased to exercise its former deliberative and consultative functions (except through the medium of its committees (*k*)), and meets principally to confer formal approval upon documents, the purport and tenor of which has been previously considered and decided upon by the Cabinet, committees of the Council, or the various ministers and Government departments.

Other transactions which take place at meetings of the Privy Council are the administration of official oaths, appointments to offices under the Crown by delivery of the various seals, or resignation of the same, the performance of the ceremony of homage by bishops, and the choosing of sheriffs for the current year.

The legal jurisdiction of the Privy Council, which mainly consists

(*g*) The standing committees on the universities are due to the Universities of Oxford and Cambridge Act, 1877 (40 & 41 Vict. c. 48), ss. 3—6 (and see title EDUCATION), and the Universities (Scotland) Act, 1889 (52 & 53 Vict. c. 55), s. 9; the committee for the grants of charters incorporating boroughs to the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 210, 211.

(*h*) Civil List and Secret Service Money Act, 1782 (22 Geo. 3, c. 82), s. 15.

(*i*) The variety and scope of the matters to which the orders and proclamations relate, and which obtain the force of law without previous parliamentary criticism, are worthy of comment, extending as they do from the regulation of colonial institutions to the formulation of rules relating to the details of domestic administration. For the documents by which the powers of the Council are exercised, see the Statutory Rules and Orders.

(*k*) The Privy Council was originally the chief advisory council of the Crown, but its functions in that respect were transferred to the Cabinet, which was originally a committee of the Council, after the revolution of 1688 (see note (*m*), p. 41, *ante*); and as to the repealed provisions of the Act of Settlement restoring the old deliberative functions to the Privy Council, see *ibid.* In 1714, when Anne was on her deathbed, Bolingbroke's plan for the restoration of the Jacobite line was defeated by Argyll and Somerset, who appeared suddenly and summoned a meeting of privy councillors residing near London. At this meeting measures were concerted which secured the present line of succession (see Mahon, History of England, 3rd ed., Vol. I., 92).

in appeals in prize cases, from the ecclesiastical courts, and from the various courts abroad, is now exercised by the Judicial Committee of the Privy Council (*l*).

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SECT. 4.—*The Lord Chancellor.*

SUB-SECT. 1.—*General Nature of the Office.*

Lord Chancellors of Great Britain and of Ireland.

79. As from the 1st May, 1707 (*m*), there has been one Lord High Chancellor (or Lord Keeper or Commissioners of the Great Seal) (*n*) for the United Kingdom of Great Britain (*o*), and as from the 1st January, 1801 (*p*), also a Lord Chancellor (or Lord Keeper or Commissioners of the Great Seal) for that part of the United Kingdom called Ireland (*q*), and as from the 30th August, 1889, unless the contrary intention appears, the expression "the Lord Chancellor" in all Acts of Parliament, except when used with reference to Ireland only, means the Lord High Chancellor of Great Britain, and when used with reference to Ireland only, means the Lord Chancellor of Ireland for the time being (*r*).

Appointment of Lord Chancellor of Great Britain.

80. The Lord High Chancellor of Great Britain is appointed by the Sovereign delivering the Great Seal of the United Kingdom into his custody (*s*) and verbally addressing him by the title (*t*); and

(*l*) Established by the Judicial Committee Act, 1833 (3 & 4 Will. 4), c. 41. As to the composition and jurisdiction of this body generally, see Vol. VI., p. 426, and title COURTS.

(*m*) Namely, the date from which the Union with Scotland took effect; see the Union with Scotland Act, 1706 (6 Ann. c. 11; 5 Ann. c. 8, Ruff.), art. 1.

(*n*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12 (1). By the Great Seal Act, 1884 (47 & 48 Vict. c. 30), s. 4, the expression "Lord Chancellor" in that Act means the Lord High Chancellor of Great Britain, and, if there is a Lord Keeper or Lords Commissioners of the Great Seal of the United Kingdom, the Act is to apply as if such Lord Keeper or Lords Commissioners were substituted for the Lord Chancellor. A Lord Keeper has the same authority and powers as a Lord Chancellor (stat. (1562) 5 Eliz. c. 18). By stat. (1688) 1 Will. & Mar. c. 21, Lords Commissioners of the Great Seal were declared to have the same authority and powers as a Lord Chancellor or Lord Keeper. By the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 98, Lords Commissioners are declared to represent the Lord Chancellor for the purposes of the Act save that the powers conferred on the Lord Chancellor by the Act as to the presidency of the Court of Appeal and the appointment and approval of officers or the sanction to any order for the removal of officers, or any other act to which the concurrence or presence of the Lord Chancellor is made necessary by the Act, may be exercised by the senior Lord Commissioner for the time being. See also Macqueen, Practice of the House of Lords and Privy Council, p. 20, for an instance of the Lord Chancellor acting as "Lord Chancellor of Great Britain and Ireland." See also Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100.

(*o*) This follows from the provisions of the Union with Scotland Act, 1706 (6 Ann. c. 11); and see the text below as to the use of the Great Seal of the United Kingdom.

(*p*) Namely, the date from which the Union with Ireland took effect; see the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), art. 1.

(*q*) This follows from the provisions of the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67); see arts. 1, 4, 8, ss. 2, 3.

(*r*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12 (1). As to the use of the respective seals for the United Kingdom, Scotland and Ireland, see p. 10, *ante*.

(*s*) See 3 Bl. Com., 14th ed., 47; Ellesmere, Office of Lord Chancellor, ed. 1651, p. 15.

(*t*) Campbell, Lives of the Chancellors, ed. 1845, Vol. I., 21. The appointment

SECT. 4. The Lord Chancellor.

though no special qualifications (other than those, if any, required by statute as to religion (*u*)) for the post are required by law (*x*), it is, in practice, usual for the Sovereign to appoint the person recommended by the Prime Minister from amongst such members of the Bar as hold or have held the office of Attorney or Solicitor General.

Oaths of office.

Upon appointment he must take the oath of allegiance, and the official and judicial oaths (*y*); and it appears that he may legally be required to make a declaration against transubstantiation (*a*).

Salary.

81. The Lord Chancellor receives an annual salary whilst holding office of such yearly sum as, together with the salary or sum payable to him as Speaker of the House of Lords, is sufficient to make up the net yearly sum of £10,000, to be paid free and clear from all taxes and deductions whatsoever (*b*). This salary is to

was formerly made occasionally by patent or writ of privy seal, or by suspending the Great Seal round the neck (*ibid.*). Ellesmere (p. 16) refers to the case of Ralph Nevill, Bishop of Chester, *temp.* Hen. 3, who received three patents, two appointing him Chancellor and the third for the custody of the Seal.

(*u*) Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), s. 12, by which nothing in that Act is to enable "any person, otherwise than as he was on the 13th April, 1829, by law enabled, to hold or enjoy the office of Lord Chancellor, Lord Keeper or Commissioner of the Great Seal of Great Britain." It has been argued that, in accordance with this provision, the Lord Chancellor may legally be required to make a declaration against transubstantiation, since the Test Act, 1672 (25 Car. 2, c. 2), required that everyone who held an office, civil or military, under the Crown, in addition to taking the oaths of allegiance and supremacy, should receive the Sacrament according to the usage of the Church of England, and should also make a declaration abjuring the doctrine of transubstantiation. By the Act 9 Geo. 4, c. 17 (1828), the obligation to take the Sacrament was removed, but the Roman Catholic Relief Act, 1829 (10 Geo. 4, c. 7), although it enabled Roman Catholics to take a form of oath which was in accordance with their religious belief, contained the provision stated *supra* as to the Lord Chancellor (see Parliamentary Debates, Vol. CCXLIX., cited Anson, Law and Custom of the Constitution, Vol. II., 155). The Test Act, 1672, is now repealed by the Statute Law Revision Act, 1863 (26 & 27 Vict. c. 125), and except in the case of the Sovereign, who is not named in the Act, the necessity for taking the oath against transubstantiation has been entirely removed as to all civil and military offices (subject to an exception as to persons professing the Roman Catholic religion) by the Test Abolition Act, 1867 (30 & 31 Vict. c. 62) (see p. 28, *ante*). The provisions of s. 2 of Religious Disabilities Act, 1846 (9 & 10 Vict. c. 59), may also be noted, by which His Majesty's subjects professing the Jewish religion are to be subject to the same laws as Protestant subjects in respect to their schools, places for religious worship, education, and charitable purposes, and the property held therewith, and not further or otherwise. Whatever the effect of the above provisions may be, it would clearly be held unconstitutional by Parliament for any person other than a Protestant to be appointed. The Irish Lord Chancellor may, however, be a Roman Catholic.

(*x*) By s. 5 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), the Lord Chancellor was included in the number of judges of the High Court, but by s. 3 of the Judicature Act, 1875 (38 & 39 Vict. c. 76), he is no longer a permanent judge of that court, and the provisions relating to the appointment of judges of the High Court in s. 5 of the former Act are not to apply to him.

(*y*) By the joint effect of the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 5, and the Promissory Oaths Act, 1867 (31 & 32 Vict. c. 72), s. 5; and see p. 24, *ante*.

(*a*) See note (*u*), *supra*.

(*b*) Court of Chancery Act, 1852 (15 & 16 Vict. c. 87), s. 16. This sum is chargeable upon the Consolidated Fund of the United Kingdom (*ibid.*; and see the Courts of Justice (Salaries and Funds) Act, 1869 (32 & 33 Vict. c. 91), s. 12),

include any pension granted in respect of any public office previously filled by him (*c*).

Pension.

82. The Sovereign may give and grant to any person executing the office of Lord High Lord Chancellor of Great Britain for the time being (or the office of Lord Keeper of the Great Seal of the same) an annuity not exceeding £5,000, to commence on resignation or removal, and to continue during the natural life of such person (*d*). The annuity is charged on the Consolidated Fund, and is to be paid and payable quarterly, free and clear of all taxes and deductions whatsoever, and may be limited by the letters patent conferring it, both as to duration and payment of the same or any part, to such periods of time during the natural life of the grantee in which he shall not execute the office of Lord Chancellor or Lord Keeper of the Great Seal or any other office of profit under the Crown, so that the annuity together with the salary and profits of such other office do not together exceed in the whole the sum of £5,000 (*e*).

Tenure of office.

83. The Lord Chancellor of Great Britain holds office during pleasure, and, as a member of the ministry and the Cabinet under the established usage (*f*), retires from or accepts office with the party to which he belongs (*g*). The office is in practice determined by the voluntary surrender of the Great Seal into the hands of the Sovereign upon retirement from office or resignation, or by the Sovereign's demanding it in person or sending a messenger for it under the sign manual upon dismissal (*h*). He is expressly excepted from the provisions of the Judicature Act, 1875, as to tenure of office during good behaviour applicable to the judges of the High Court and of the Court of Appeal (*i*).

Precedence and place in Parliament.

84. The Lord Chancellor of Great Britain, if of the degree of baron of Parliament or above, has precedence next below the Archbishop of Canterbury, above all dukes, except the King's sons, brothers, uncles, nephews (*k*), or the King's brothers' or sisters' sons (*l*). If below the degree of baron, he, together with certain

after paying or reserving sufficient to pay all sums charged thereon by Act prior to the 1st July, 1852, but with precedence to all other payments thereafter charged upon such fund (Court of Chancery Act, 1852 (15 & 16 Vict. c. 87), *supra*).

(*c*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 13.

(*d*) Lord Chancellor's Pension Act, 1832 (2 & 3 Will. 4, c. 111), s. 3.

(*e*) *Ibid.* The annuity is charged on the Consolidated Fund after paying or reserving all sums directed to be paid thereout by former Acts (*ibid.*).

(*f*) See p. 37, *ante*, and the text, *infra*.

(*g*) As to the retirement of the ministry as a whole, see p. 49, *ante*.

(*h*) Campbell, Lives of the Chancellors, ed. 1845, Vol. I., p. 22.

(*i*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 5.

(*k*) This word in the Act would appear to be an error for grandsons or some other word, in view of the provisions immediately following.

(*l*) Stat. 31 Hen. 8 (1539), c. 10, s. 4, which directs that the Chancellor and certain other officers named (if of the required rank) are to sit on the higher part of the form on the left side of the Parliament chamber above all dukes etc. as in the text. The Lords are to sit in the same order as is prescribed by the Act, except that the Lord Chancellor sits on the woolsack (Lords' Standing Orders (Public Business), No. 4).

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other officers (*m*), is to sit and be placed at the uppermost parts of the sacks in the middle of the Parliament Chamber, either there to sit upon one form, or upon the uppermost sack, the one of them above the other in order as named in the Act (*n*). When presiding in the House of Lords the Lord Chancellor occupies the woolsack (*o*), and votes without leaving it. He must always speak uncovered; and when he addresses the House otherwise than as president he is to go to his own place as a peer (*p*). By virtue of his office (but only if he be a baron of Parliament), he in fact goes to the left of the chamber, above all dukes not being of the blood royal (*q*).

Murder of Lord Chancellor.

85. To slay the Lord Chancellor, being in his place doing his office, formerly constituted the offence of treason (*r*), but may now, it seems, be treated as murder simply (*s*).

Division of duties.

86. The Lord Chancellor's duties fall into three divisions—political, administrative, and judicial (*t*).

SUB-SECT. 2.—*Political Duties.*

Offices held by Lord Chancellor.

87. The Lord Chancellor is a member of the Cabinet, not, it is said, as of right, but because his duties as holder of the Great Seal make him a necessary party to the innermost councils of the Crown (*u*). Retirement from the office of Chancellor is generally understood to involve retirement from the Cabinet (*a*). He is also a sworn member of the Privy Council for the same reason (*b*), and is said to have a prescriptive right to be such (*c*).

Speaker of House of Lords.

He is by prescription Prolocutor or Speaker of the House of Lords in its legislative capacity, and always presides there when

(*m*) Namely, the Lord Treasurer, Lord President of the Council, Lord Privy Seal or Chief Secretary, being below the degree of baron.

(*n*) Stat. 31 Hen. 8, c. 10, s. 8.

(*o*) See note (*l*), p. 57, *ante*. The woolsack is technically not within the House.

(*p*) Lords' Standing Orders (Public Business), No. 20. He is not to adjourn the House, or do anything else as the mouth of the House, without the consent of the Lords first had, excepting the ordinary thing about Bills which are of course, wherein the Lords may also overrule, as for preferring one Bill before another and such like; and in case of difference among the Lords it is to be put to the question (*ibid.*).

(*q*) Stat. 31 Hen. 8 (1539), c. 10, s. 4; and see p. 57, *ante*.

(*r*) Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2).

(*s*) Offences against the Person Act, 1861 (24 & 25 Vict. c. 100); and see Vol. VI., p. 350.

(*t*) The office dates back to the reign of Edward the Confessor, at which period he already as chief secretary, chief chaplain, and custodian of the Great Seal performed the functions from which are derived his present position and duties (Anson, Law and Custom of the Constitution, Vol. II., 150). For the early history of the Chancellorship, see 3 Bl. Com., 14th ed., 47; Ellesmere, the Office of Chancellor; Selden, Office of Lord Chancellor; Campbell, Lives of the Chancellors; and for the history of his equitable jurisdiction, Spence, Equitable Jurisdiction of the Court of Chancery; Holdsworth, Hist. Eng. Law, Vol. I., c. 5; Kerly, History of Equity; Maitland, Const. Hist. of England, 222, 466.

(*u*) Anson, Vol. II., 154. The office has been a party office since Lord Thurlow.

(*a*) See p. 43, *ante*.

(*b*) Campbell, Lives of the Chancellors, ed. 1845, Vol. I., 15, commenting on a statement in Selden, Office of Lord Chancellor, s. 3, to the effect that he is a privy councillor by virtue of his office.

(*c*) See p. 52, *ante*.

present, without any commission or express authority (*d*). He is not necessarily a peer (*e*), and when not a peer has no right to vote or even to address the House (*f*), his office being limited to the putting of questions and other formal proceedings (*g*). In the absence (*h*) of the Lord Chancellor the woolsack is occupied by one of the commissioners appointed under the Great Seal to represent him (*i*). When the Lord Chancellor and the commissioners are absent at the same time, the Lords elect a Speaker *pro tempore* (*k*), who retires, it appears, on the arrival of one of the commissioners, who themselves give place to one another in the order of precedence, and retire before the Lord Chancellor (*k*).

The Lord Chancellor is invested with no more authority than an ordinary member (*l*), so that the rules for preserving order are enforced, not by him, but by the House itself (*m*). The House itself, therefore, determines questions of precedence in addressing it, although it is customary, it appears, to give precedence to the Lord Chancellor himself when he rises (*n*).

The Lord Chancellor and the Sovereign.

88. He is, in general, the formal medium of communication between the Sovereign and Parliament (*o*). On the meeting of a new Parliament it is his duty, in the event of the Sovereign not being present to open Parliament in person, to inform the House of the fact and of the appointment of a commission under the Great Seal to perform that duty, and to make a similar announcement to the Commons after they have been summoned. He then directs the Commons (after the letters patent appointing the commissioners have been read) to retire to elect a Speaker, and on the following day he signifies the Sovereign's approval and confirmation of the election (*p*). A similar procedure is adopted in proroguing Parliament (*q*). When the Sovereign meets Parliament in person the Lord Chancellor may be directed to read the Speech from the Throne, and

(*d*) Lords' Standing Orders (Public Business), No. 5. It is the duty of the Lord Chancellor or Lord Keeper ordinarily to attend the House of Lords, and in case they be absent, and there be none authorized under the Great Seal from the King to supply that place in the House of Peers, the Lords may then choose their own Speaker during that vacancy (*ibid.*).

(*e*) For recent instances of commoners holding the office of Lord Chancellor or Lord Keeper, see May, Parliamentary Practice, 189.

(*f*) When he does so, he speaks uncovered (Lords' Standing Order No. 20).

(*g*) See May, Parliamentary Practice, 191.

(*h*) As to his obligation to attend, see May, Parliamentary Practice, 189, note 2.

(*i*) See note (*n*), p. 55, *ante*.

(*k*) See May, Parliamentary Practice, 190. When the Great Seal has been in commission, it has been usual to appoint the Chief Justice of the King's Bench or Common Pleas, the Chief Baron of the Exchequer, and the Master of the Rolls (*ibid.*, 189). The Great Seal has not been in commission since the abolition (by Order in Council of 16th December, 1880) of the offices of Chief Justice of the Common Pleas and Chief Baron of the Exchequer.

(*l*) See note (*p*), p. 58, *ante*.

(*m*) *Ibid.*

(*n*) See May, Parliamentary Practice, 311.

(*o*) Other means of communication appear to be sometimes adopted; see p. 35, *ante*, as to addresses.

(*p*) May, Parliamentary Practice, 149, 399; and see title PARLIAMENT.

(*q*) Lords' Standing Orders (Public Business), No. 3; and see title PARLIAMENT.

SECT. 4. The Lord Chancellor.

in the absence of the Sovereign it is his duty to do so (*a*), as well as to read all other messages from the Sovereign to Parliament (*b*). He also presents addresses of the Houses to the Sovereign, and, with the Speaker of the House of Commons, presents joint addresses of both Houses and reports the answers thereto (*c*). It is also his duty to report the royal assent to Bills when given by commission (*d*).

SUB-SECT. 3.—*Administrative Duties.*

(1) *As Custodian of the Great Seal.*

Great Seal of the United Kingdom.

89. From the 1st May, 1707 (*e*), there has been one Great Seal of the United Kingdom (*f*), which is different from that used in England or Scotland before the union of the two kingdoms (*g*).

Use of the seals for the United Kingdom, Scotland, and Ireland.

The cases in which the Great Seal of the United Kingdom (as distinguished from the seals for Scotland and Ireland), the seal for Scotland, and the Great Seal of Ireland respectively are to be used are provided for by statute (*h*).

Custody of the Great Seal.

90. The Lord Chancellor is the custodian of the Great Seal (*i*). Except when the Great Seal is intrusted to a Lord Keeper (*k*), or is in commission (*l*), it remains in the custody of the Lord Chancellor, who causes it to be affixed to such documents as require it through the Office of the Clerk of the Crown in Chancery, where the Great Seal is now kept (*m*).

Use of the Great Seal.

91. The number of documents requiring to be sealed with the Great Seal has been restricted, and provision has been made for the use of a wafer seal in certain cases (*n*), and also for the preparation of and mode of passing documents under the Great

(*a*) Lords' Standing Orders, No. 2.
(*b*) May, Parliamentary Practice, 446.
(*c*) *Ibid.*, 455.
(*d*) See title PARLIAMENT.
(*e*) Namely, the date of the Union with Scotland; see the Union with Scotland Act, 1706 (6 Ann. c. 11; 5 Ann. c. 8, Ruff.), art. 1.
(*f*) United Kingdom of Great Britain in the Act; now, since the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), the United Kingdom of Great Britain and Ireland.
(*g*) Union with Scotland Act, 1706 (6 Ann. c. 11), art. 24.
(*h*) As to the use of the seals, see p. 10, *ante*.
(*i*) See p. 55, *ante*, for the title of the Lord Chancellor and for the substitution of a Lord Keeper or Commissioners. The rank of Lords Commissioners is not the same as that of the Lord Chancellor or Lord Keeper. If peers, they take their place according to their peerage; if commoners, their place is after the peers and the Speaker of the House of Commons (Anson, Law and Custom of the Constitution, Vol. II., 156). The last occasion upon which the Great Seal was in commission was in 1850, when Lord Langdale, M.R., Shadwell, V.-C., and Rolfe, B., were appointed.
(*k*) By stat. 5 Eliz. c. 18 (1562) the Lord Keeper is declared to have the same authority, pre-eminence, and jurisdiction as a Lord Chancellor. The last Lord Keeper was Sir Robert Henley, afterwards Lord Northington (Campbell, Lives of the Chancellors, ed. 1845, Vol. I., 21; Vol. V., 186, 199).
(*l*) See p. 55, *ante*.
(*m*) Great Seal (Offices) Act, 1874 (37 & 38 Vict. c. 81); Crown Office Act, 1877 (40 & 41 Vict. c. 41); Crown Office Act, 1890 (53 & 54 Vict. c. 2), s. 1 (3).
(*n*) Crown Office Act, 1877 (40 & 41 Vict. c. 41), s. 4. As to the use of wafer seals, see p. 13, *ante*.

Seal (*o*). The Lord Chancellor may direct that any documents may nevertheless pass under the Great Seal in any particular case in which it shall be found more convenient (*a*).

Letters patent under the Great Seal are still employed in ratifying treaties with foreign Powers (*b*), in creating peers, and in appointing judges of the High Court, and for various other purposes (*c*).

Letters patent for inventions are sealed with the seal of the Patent Office, which has the same effect as if they were sealed with the Great Seal (*d*).

Where the Crown acts on the advice of the Privy Council, as in grants of charters to towns or other corporate bodies, or in the case of a warrant proceeding from the Colonial Office in reference to a colonial appointment which is made under the Great Seal, it is said to be necessary that an Order in Council should be made before the issue of the warrant (*e*). An Order in Council may itself be sufficient following upon a royal proclamation, as in the case of the issue of writs for a new Parliament (*f*).

Counterfeiting the Great Seal is a felony (*g*).

"Damasking" the Great Seal.

92. On the introduction of a new seal consequent on a demise of the Crown or on a change of the royal arms or style, or when the old seal is worn out, the old seal becomes the property of the Chancellor. In theory the old seal is first broken, the Sovereign destroying its virtue by breaking or "damasking" it by giving it a gentle blow with a hammer (*h*).

(2) *As Head of the Judiciary.*

Appointment of judges.

93. The Lord Chancellor, as head of the judicial administration, is responsible for the appointment of the judges of the High Court (*i*). He appoints the judges of county courts (*k*), except when the whole of a county court district lies within the Duchy of Lancaster (*l*), and advises the Crown with regard to the nomination of persons to serve as justices of the peace (*m*). He is also empowered

(*o*) By rules made 22nd February, 1878, and 8th August, 1878; see *ante*, p. 13.

(*a*) *Ibid.*

(*b*) Anson, Law and Custom of the Constitution, Vol. II., 54.

(*c*) See *ante*, pp. 13 *et seq.*

(*d*) Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 12.

(*e*) Anson, Law and Custom of the Constitution, Vol. II., 57.

(*f*) *Ibid.*

(*g*) Forgery Act, 1861 (24 & 25 Vict. c. 98), s. 1. By the Treason Act, 1351 (25 Edw. 3, stat. 5, c. 2), the offence was constituted high treason.

(*h*) Campbell, Lives of the Chancellors, ed. 1845, Vol. I., 25. On a demise of the Crown the Great Seal continues to be used until the successor to the Crown shall give order to the contrary (Succession to the Crown Act, 1707 (6 Ann. c. 41; c. 7, Ruff.), s. 9).

(*i*) Except the Lord Chief Justice of England, the responsibility for whose appointment rests with the Prime Minister.

(*k*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 8. The appointments are made by the Lord Chancellor himself, and not, as in the case of judges of the High Court, by the Crown upon his recommendation.

(*l*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 8. The appointment in such a case is made by the Chancellor of the Duchy.

(*m*) The appointments are usually made in counties on the recommendation of the Lord Lieutenant, and in boroughs on that of the Home Secretary; see title MAGISTRATES.

SECT. 4. **The Lord Chancellor.**

by various statutes either to make rules himself or to act as a member of committees appointed to make statutory rules and orders.

Appointment and removal of officers.

94. The Lord Chancellor has the exclusive power of appointing officers assigned to perform duties with respect to the Supreme Court generally, or attached to the High Court, or the Court of Appeal; also all commissioners to take oaths or affidavits in the Supreme Court (*n*).

He has certain powers, in concurrence with the Presidents of divisions of the High Court, of determining what officers are to be attached to the Supreme Court, and which of such officers are to be attached to the several courts, divisions, or judges for the performance of special duties (*o*). He also has powers, in concurrence with certain other judges, with regard to filling any vacancy in the office of master of the High Court or in any clerkship in the Central Office (*p*). His approval is necessary for the removal from his office of any officer of the Supreme Court, other than such officers attached to the person of a judge as are removable by such judge at his pleasure (*q*).

Writs of summons in the High Court, unless by any statute or by the Rules of the Supreme Court otherwise provided, are tested in the Lord Chancellor's name (*r*).

(3) *As a Judicial Officer.*

Judicial duties.

95. The Lord Chancellor is one of the judges of the Supreme Court, and is a member (though not a permanent judge) of the High Court of Justice (*s*) and its president (*t*), and has as such equal power, authority, and jurisdiction in any division of the court (*u*). He is president of the Chancery Division of the High Court (*v*), and an *ex officio* judge of the Court of Appeal (*w*) and its president (*a*). An ex-Lord Chancellor remains an *ex officio* member

(*n*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 84. As to the appointment of officers in the Chancery Division, and in the Probate, Divorce and Admiralty Division, and of officers attached to divisions and to judges, see *ibid.*, and title COURTS.

(*o*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 84.

(*p*) Judicature (Officers) Act, 1879 (42 & 43 Vict. c. 78), s. 9, as amended by the Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 19.

(*q*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 84. Such officers are removable by the person having the right of appointment, for reasons to be assigned in the order of removal (*ibid.*).

(*r*) R. S. C., Ord. 2, r. 8; and see p. 16, *ante*.

(*s*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 5. He is not one of the "permanent" judges of the High Court within the meaning of the proviso to the section which is repealed by the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 3. His original criminal jurisdiction, except in so far as it is conferred by his membership of the High Court, is now obsolete; see Anson, Law and Custom of the Constitution, Vol. II., 151.

(*t*) In the absence of the Lord Chancellor the Lord Chief Justice is President (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 5).

(*u*) *Ibid.*

(*v*) *Ibid.*, s. 31 (1).

(*w*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 4. The jurisdiction and powers of the Court of Appeal in Chancery were transferred to this court by s. 18 of the Judicature Act, 1873 (36 & 37 Vict. c. 66).

(*a*) Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 6.

of the Court of Appeal, but may not be required to sit and act as a judge of that court unless, upon the request of the Lord Chancellor, he consents to do so, and while so sitting and acting he ranks therein according to his precedence as a peer (*b*).

Scotland.

96. As a judge the Lord Chancellor has no jurisdiction whatever in Scotland, but has only certain statutory powers relating thereto which are not judicial (*c*).

House of Lords.

97. As Prolocutor or Speaker of the House of Lords he presides over the House when sitting as the highest court of appeal. He presides in cases of impeachment of a commoner (*d*), but not on the trial of a peer, either on impeachment or otherwise (*e*). An ex-Lord Chancellor, being a person who has held high judicial office, if a peer, is a Lord of Appeal in Ordinary and qualified to sit in the House as such (*f*).

Privy Council.

The Lord Chancellor is also a member of the Judicial Committee of the Privy Council (*g*) as being a privy councillor who holds, or has held, high judicial office (*h*).

Justice of the Peace.

He is a justice of the peace *virtute officii* in each county, riding, and division (*i*).

Judicial duties of Commissioners of the Great Seal.

98. When the Great Seal is in commission, the Lords Commissioners are to represent the Lord Chancellor for the purposes of the Judicature Act, 1873, except that as to the presidency of the Court of Appeal, the appointment or approval of officers, or the sanction to any order for the removal of officers, or any other act to which the concurrence or presence of the Lord Chancellor is made necessary by the Act, the powers given to the Lord Chancellor by the Act may be exercised by the senior Lord Commissioner for the time being (*k*).

Judicial duties of Lord Keeper.

99. In the Judicature Act, 1873, the term "Lord Chancellor" includes "Lord Keeper of the Great Seal" (*l*).

(*b*) Judicature Act, 1891 (54 & 55 Vict. c. 53), s. 1. As to whether the Court of Appeal is bound by the decision of a Lord Chancellor sitting alone in the old Court of Appeal in Chancery, see *Re Lloyd*, *Lloyd* v. *Lloyd*, [1903] 1 Ch. 385, C. A., at p. 392.

(*c*) See *Stuart* v. *Bute* (*Marquis*) (1861), 9 H. L. Cas. 440, 454, 455 (scheme settled in Chancery for the education and care of an infant having property in England and Scotland; tutor dative in Scotland restrained from proceedings in the Court of Session on the ground that, as to the benefit of the infant, there should be reciprocity of action between English and Scotch courts).

(*d*) May, Parliamentary Practice, 664.

(*e*) In the trial of Earl Russell ([1901] A. C. 446) the Lord Chancellor presided as Lord High Steward, which office is merged in the Crown; see Vol. VI., p. 328.

(*f*) Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 25.

(*g*) As constituted under the provisions of the Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), and the Appellate Jurisdiction Act, 1887 (50 & 51 Vict. c. 70), s. 3.

(*h*) As defined by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 25, and the Appellate Jurisdiction Act, 1887 (50 & 51 Vict. c. 70), s. 5.

(*i*) See 1 Bl. Com., 14th ed., 350, and title MAGISTRATES.

(*k*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 98.

(*l*) *Ibid.*, s. 100. See, also, as to the Lord Keeper, note (*n*), p. 55, *ante*.

SECT. 4.

The Lord Chancellor.

(4) *Patronage of the Crown.*

Ecclesiastical patronage.

100. The Lord Chancellor is patron of all the King's livings of the value of £20 and under (*m*), and acts, by custom, independently of the Crown (*n*). He is visitor of all colleges and hospitals of royal foundation (*o*).

(5) *Miscellaneous Jurisdiction.*

Various powers.

101. The miscellaneous jurisdiction, derived from the fact that the Lord Chancellor represented the Crown before the development of the various departments of government, has now been almost entirely delegated (*p*). The equitable jurisdiction as developed and administered in the Court of Chancery is now vested in the High Court of Justice (*q*).

His original powers as a member of the Curia and the Court of Exchequer gave him some powers, in common with the judges of the courts of common law (*r*), with regard to the issue of writs of *habeas corpus* and prohibition (*s*), while the writ of *ne exeat regno* was under his exclusive jurisdiction (*t*). He still has power to remove any coroner from his office for inability or misbehaviour in the discharge of his duty (*u*). His jurisdiction derived through the Crown when acting in its capacity of *parens patriæ*, in matters relating to charities, idiots and lunatics, and infants, has been delegated to the High Court of Justice (*v*), and his former statutory jurisdiction in bankruptcy has been superseded (*x*).

Effect of the Judicature Act, 1873.

102. Except as expressly therein directed, the Judicature Act, 1873, does not affect the office or position of Lord Chancellor, and his officers are to continue attached to him as if the Act had not passed. All duties which any officer of the Court of Chancery might, when the Act came into force (namely, 1st November, 1875), be required to perform in aid of any of the Lord Chancellor's duties may be required to be performed by such officer when transferred to the Supreme Court and his successors (*y*).

(*m*) Campbell, Lives of the Chancellors, ed. 1845, Vol. I., 18.

(*n*) Anson, Law and Custom of the Constitution, Vol. II., 53. The provisions of the Jews Relief Act, 1858 (21 & 22 Vict. c. 49), s. 4, should be noted, by which the exercise of the Crown's ecclesiastical patronage, and the giving of advice by a Jew to the Crown or Lord Lieutenant of Ireland as to disposals of offices in the Church of England or Scotland, is prohibited. See also, as to Jewish disabilities, note (*u*), p. 56, *ante*.

(*o*) Brydall, Jus Sigilli (1673), 24; Campbell, Lives of the Chancellors, ed. 1845, Vol. I., 19.

(*p*) See titles referred to in notes (*t*) and (*v*), *infra*.

(*q*) Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 3, 16 (1).

(*r*) Campbell, Lives of the Chancellors, ed. 1845, Vol. I., 12; Anson, Law and Custom of the Constitution, Vol. II., 152; *Crowley's Case* (1818), 2 Swan. 1.

(*s*) Campbell, Lives of the Chancellors, ed. 1845, Vol. I., 13.

(*t*) *Ibid.*

(*u*) Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 8 (1); and see title CORONERS.

(*v*) See titles INFANTS; LUNATICS AND PERSONS OF UNSOUND MIND. As to his powers with regard to petitions of right, see title CROWN PRACTICE.

(*x*) By the early statutes relating to bankrupts a summary jurisdiction was given to the Chancellor without right of appeal (see 3 Bl. Com., 14th ed., 428). See as to the present practice, title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 1.

(*y*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 94.

SECT. 5. The Lord Privy Seal.

SECT. 5.—*The Lord Privy Seal.*

Status.

103. The office of Lord Privy Seal since the passing of the Great Seal Act, 1884, which renders the use of the Privy Seal in all cases unnecessary (*z*), is a purely honorary one. It usually confers Cabinet rank upon its holder, and has been utilised in recent times for the purpose of enabling a minister to be a member of that body without holding an office to which definite duties are attached. The office is usually unpaid (*a*).

Upon appointment the Lord Privy Seal is required to take the oath of allegiance and official oath (*b*).

SECT. 6.—*The Secretariat* (*c*).

The office of Secretary of State.

104. The ordinary method of communication between Sovereign and subject is through a Secretary of State (*d*). His Majesty's Principal Secretaries of State are five in number, namely, the Secretaries of State for the Home Department, for Foreign Affairs, for the Colonies, for the War Department, and for India. Although the secretarial duties are divided among five persons presiding over separate departments of government, each secretary is capable in point of law of performing the duties of all or any of the departments (*e*).

(*z*) The Great Seal Act, 1884 (47 & 48 Vict. c. 30), s. 3, enacts that it shall not be necessary that any instrument shall be passed under the Privy Seal. Although this section has now been repealed by the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22), the necessity for employing the Privy Seal in connection with the affixing of the Great Seal has been rendered unnecessary by s. 2 (1) of the Great Seal Act, 1884 (47 & 48 Vict. c. 30). Its use as an authority for the issue of money from the Exchequer has been superseded by the practice of employing a royal order under the sign manual, countersigned by the Treasury. The above repeal does not revive the use of the Privy Seal (see p. 11, *ante*), and as to the abolition of the officers of the Lord Privy Seal, see *ibid.*

(*a*) For the history of the office, see Anson, Law and Custom of the Constitution, Vol. II., 156. The Lord Privy Seal is still *virtute officii* included in the commission of the peace in each county, riding, and division, and is a member of several boards, such as the Local Government Board, which never meet (see p. 103, *post*).

(*b*) See p. 24, *ante*.

(*c*) For the history of the secretariat, see Thomas, History of Public Departments, pp. 23—36; Proceedings and Ordinances of the Privy Council, ed. Nicolas, Vol. VI., p. xcvii.; *Harrison* v. *Bush* (1855), 5 E. & B. 344, at p. 352; *Entick* v. *Carrington* (1765), 19 State Tr. 1030.

(*d*) *Harrison* v. *Bush*, *supra*. A communication made to a Secretary of State with reference to matters falling within the scope of his department is therefore privileged (*ibid.*; but see *Blagg* v. *Sturt* (1846), 10 Q. B. 899; affirmed Ex. Ch., *ibid.*, 906).

(*e*) Parliamentary History, Vol. XXXIII., 976; *Harrison* v. *Bush*, *supra*. The authority of a Secretary of State is derived partly from the common law prerogatives of the Crown which he administers, partly from powers conferred upon him by statute. Such powers are almost invariably conferred upon "one of His Majesty's Principal Secretaries of State." For an exception, see the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 2, whereby the duty of submitting a petition of right to the Sovereign is assigned to the Home Secretary. By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12 (3), unless the contrary intention appears, the expression "Secretary of State" is defined to mean "one of His Majesty's Principal Secretaries of State for the time being." The fact that the office is one, and the division of its duties merely one of convenience, is illustrated by the fact that the removal of a Secretary of State from one department to another does not necessitate re-election in the event of his being a member of the House

SECT. 6. **The Secretariat.**

Status and staff.

105. The appointment, which is during pleasure, is made by grant and delivery of the seals (*f*), and upon appointment he is required to take the oath of allegiance and official oath (*g*).

106. The Principal Secretaries of State are members of the Privy Council and of the Cabinet; they are also included in the commission of the peace for each riding, county, and division (*h*).

Each Principal Secretary is invariably assisted by a parliamentary under-secretary and a permanent secretary, or more than one such secretary may, it seems, be allotted to him in accordance with the requirements of the office (*i*).

Not more than four of the Principal Secretaries are capable of sitting and voting in the House of Commons at the same time (*k*); and the same principle is applicable to their Under-Secretaries. Infringement of this provision entails liability to a penalty (*l*).

Responsibility.

107. A Secretary of State is responsible to Parliament, as a member of the Cabinet, for the advice which he gives to the Crown, for the administration of the department over which he presides, and for acts done under his authority (*m*).

Actions against a Secretary of State.

108. The personal responsibility of a Secretary of State to individuals in his official capacity is limited to cases where such responsibility is expressly imposed by statute (*n*). An action will lie against a Secretary of State personally in respect of unlawful acts, resulting in injury to an individual, done by him personally (*o*),

of Commons (Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 52, Sched. H ; and see *Harrison* v. *Bush* (1855), 5 E. & B. 344, at p. 352, and p. 40, *ante*).

(*f*) Parliamentary History, Vol. XXXIII., 976 ; *Harrison* v. *Bush*, *supra*. In *Whaley* v. *Carlisle* (1866), 17 I. C. L. R. 792, judicial notice was taken of the fact that a particular person was Secretary of State for Foreign Affairs in 1803.

(*g*) Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 5. As to the manner of taking the oaths, see the Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48), s. 2, and, generally, p. 24, *ante*.

(*h*) See pp. 37 *et seq.*, *ante;* and as to the commission of the peace, *Harrison* v. *Bush*, *supra*, at p. 353 ; *Entick* v. *Carrington* (1765), 19 State Tr. 1030.

(*i*) See as to the power of the Crown to create offices, p. 41, *ante*.

(*k*) Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 4 ; and see, generally, p. 39, *ante*.

(*l*) See p. 39, *ante*.

(*m*) For the responsibility of ministers generally, see pp. 47 *et seq.*, *ante*. A Secretary of State ought not to disclose the advice which he gives to the Crown (*Cobbett* v. *Grey* (1850), 4 Exch. 729)

(*n*) See, as to the Home Secretary, p. 82, *post;* as to the Secretary for Foreign Affairs, p. 86, *post;* as to the Secretary for War, p. 92, *post;* and as to the Secretary in Council for India, see title DEPENDENCIES AND COLONIES. For the liability of public officers generally, see Vol. VI., p. 413, and note (*o*), *infra*.

(*o*) For the liability for unlawful acts of a public officer generally, see 2 Co. Inst. 186; Hawk. P. C. 43; 3 Bl. Com. 254; *Feather* v. *R.* (1865), 6 B. & S. 257; *Hawley* v. *Steele* (1877), 6 Ch. D. 521; *Rogers* v. *Rajendro Dutt* (1860), 13 Moo. P. C. C. 209, 236; *Raleigh* v. *Goschen*, [1898] 1 Ch. 73. Where an act injurious to a foreigner, which might otherwise afford a ground of action, is done by a British subject outside the jurisdiction of the English courts, the act, if previously authorised or subsequently ratified by the British Government, becomes an act of state, and the private right of action becomes merged in the international question which arises between the Governments of the parties (*Buron* v. *Denman* (1848), 2 Exch. 167 ; *Feather* v. *R.*, *supra*). As to acts of state generally, see Vol. VI., p. 415, and title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

or under his direct authority (*p*). The rule does not extend to make a Secretary of State liable for wrongful acts done by his subordinates, unless the act complained of was specifically authorised by the Secretary of State himself; such subordinates are the servants of the Crown, and therefore neither the Secretary of State nor any other officer of the Crown can be made liable for the torts of such subordinates (*q*).

Breach of contract.

109. An action will lie against a Secretary of State for breach of contract only in cases in which he has made himself personally liable (*r*). The fact that a Secretary of State is intrusted with the distribution of sums placed at his disposal as head of an administrative department does not constitute him a trustee of any particular portion of such sums, so as to render him liable to be sued in an action for the recovery thereof (*s*), neither is there any duty upon him from which a promise to pay such portion to any individual may be implied (*a*); he is merely the agent of the Crown to distribute the funds intrusted to him (*b*).

Trusts.

(*p*) *Wilkes* v. *Halifax* (*Lord*) (1769), 19 State Tr. 1076, at p. 1406; *Cobbett* v. *Grey* (1850), 4 Exch. 729; *Sayre* v. *Rochford* (*Earl*) (1776), 20 State Tr. 1286. Thus, an action will lie for damages for trespass and false imprisonment (*Wilkes* v. *Halifax* (*Lord*), *supra*). The action was the sequel to the decisions establishing the illegality of general warrants, as to which see note (*h*) on p. 68, *post*. An action for trespass brought against a public officer in his official capacity will therefore be dismissed, and leave to amend refused (*Cowing* v. *Secretary of State for War*, *Times*, 23rd January, 1877, cited in *Raleigh* v. *Goschen*, [1898] 1 Ch. 73). In the latter case this course was adopted without prejudice to any right to bring an action against the defendants personally. In *Dickson* v. *Combermere* (*Viscount*) (1863), 3 F. & F. 527, it was held that an action will not lie against the Secretary of State for War for causing the lieutenant-colonel of a regiment to be removed from his office by false charges, unless he has acted dishonestly, and it was doubted whether such an action would be maintainable in any case.

(*q*) The only reported instances of a Secretary of State being held personally liable in tort appear to be *Wilkes* v. *Halifax* (*Lord*), *supra*, and *Sayre* v. *Rochford* (*Earl*), *supra*, and compare *Cobbett* v. *Grey*, *supra*. For the principle upon which the proposition in the text is founded, see *Lane* v. *Cotton* (1701), 1 Ld. Raym. 646; *Nicholson* v. *Mounsey* (1812), 15 East, 384; *Tobin* v. *R.* (1864), 16 C. B. (N. S.) 310; *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93; *Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178, C. A.; *Raleigh* v. *Goschen*, [1898] 1 Ch. 73. Where a subordinate illegally does an act authorised by a superior official to be done in a legal manner, the superior is not liable (*O'Byrne* v. *Hartington* (*Marquis*) (1877), 11 I. R. C. L. 445, Ex. Ch.).

(*r*) There appears to be no reported instance of a Secretary of State being so held liable in contract. For the principle upon which the proposition in the text is founded, see *Macbeath* v. *Haldimand* (1786), 1 Term Rep. 172; *Palmer* v. *Hutchinson* (1881), 6 App. Cas. 619, P. C. An officer of state can make no agreement in derogation of the powers of the Crown (*Grant* v. *Secretary of State for India* (1877), 2 C. P. D. 445). An action will not lie against a servant of the Crown for breach of warranty of authority to enter into a contract of service on behalf of the Crown (*Dunn* v. *Macdonald*, [1897] 1 Q. B. 555, C. A.; but see *Graham* v. *Public Works Commissioners*, [1901] 2 K. B. 781, and cases there cited).

(*s*) *Grenville-Murray* v. *Clarendon* (*Earl*) (1869), L. R. 9 Eq. 11. See also Vol. VI., p. 415.

(*a*) *Gidley* v. *Palmerston* (*Lord*) (1822), 3 Brod. & Bing. 275, *per* DALLAS, C.J., at p. 285 (action by executor of a retired clerk at the War Office against the Secretary at War for retired allowance due to him, the retired clerk. Judgment for the defendant, although the money had actually been received by the Secretary at War). See also Vol. VI., p. 413.

(*b*) *Kinloch* v. *Secretary of State for India in Council* (1882), 7 App. Cas. 619; *Gidley* v. *Palmerston* (*Lord*), *supra*, at p. 286.

SECT. 6. **The Secretariat.**

The secretarial seals.

110. As the ordinary channel of communication between Sovereign and subject, a Secretary of State is the instrument through which the royal pleasure is legally declared (*c*). The seals which he controls are the signet, a second secretarial seal, and the cachet.

The signet is affixed in the Foreign Office to instruments which authorise the affixing of the Great Seal to powers to treat and to ratifications of treaties; in the Colonial Office it is affixed to commissions and to instructions.

The second secretarial seal is affixed to royal warrants, and to commissions, and is employed only in the Home Office and the War Office.

The cachet is affixed to envelopes of letters addressed personally by the Sovereign to the head of a foreign State (*d*).

Documents issued from the India Office are, it seems, not necessarily sealed with the signet or the second secretarial seal, orders and communications sent to India being merely directed to be signed by one of the Principal Secretaries of State (*e*).

Apart from his custody of the seals, a Secretary of State gives formal expression to the royal pleasure by affixing his signature to documents and orders. Instruments authorising the affixing of the Great Seal to powers to treat and ratifications of treaties are countersigned by a Secretary of State, as are also various royal orders, warrants, commissions, and instructions under the sign manual (*f*). Departmental orders and regulations issued by a Secretary of State are signed by such Secretary (*g*).

Exceptional powers of a Secretary of State.

111. The following exceptional powers (*inter alia*) are vested in a Principal Secretary of State:—

(1) The power to commit by warrant in case of high treason (*h*).

(*c*) *Harrison* v. *Bush* (1855), 5 E. & B. 344, at p. 352.

(*d*) As to the use of the seals, see Anson, Law and Custom of the Constitution, Vol. II., 168. As to the doctrine of the seals with reference to ministerial responsibility, see Maitland, Constitutional Law, 393.

(*e*) Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 19. By s. 29 the appointment of the Governor-General, governors of presidencies, and the Advocate-General, are to be made by His Majesty by warrant under the sign manual. Lieutenant-governors of Provinces are to be appointed by the Governor-General subject to His Majesty's approval.

(*f*) Anson, Law and Custom of the Constitution, Vol. II., 51. Instructions to a colonial governor are exceptional, inasmuch as they are sealed with the signet, but not countersigned (*ibid.*, 52). As to a sign manual warrant as authority for affixing the Great Seal, see p. 11, *ante*.

(*g*) Evidence of such orders and regulations may be given (a) by the production of a copy of the *Gazette* purporting to contain such orders or regulations; (b) by the production of a copy of such order or regulation purporting to be printed by the King's Printer or under the authority of His Majesty's Stationery Office; (c) by the production of a copy or extract of such order or regulation purporting to be certified by any Secretary or Under-Secretary of State (see the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), s. 2; the Documentary Evidence Act, 1882 (45 & 46 Vict. c. 9), s. 2).

(*h*) *R.* v. *Rowe* (1695), 12 Mod. Rep. 82; *Entick* v. *Carrington* (1765), 19 State Tr. 1029; *R.* v. *Despard* (1798), 7 Term Rep. 736. The power of commitment is confined to cases of high treason. General warrants issued by a Secretary of State to search for and seize the author (not named) of a seditious libel (*Leach* v. *Money* (1765), 19 State Tr. 1001), to search for and seize

(2) The power by express warrant in writing to order that letters passing though the Post Office may be opened or detained (*i*); also by warrant to authorise such persons as he thinks fit to assume control of telegraphs in the interests of the public service (*k*).

(3) The power (when the Crown by Order in Council declares that an emergency has arisen in which such a course is expedient) by warrant to authorise such persons as he thinks fit to take possession of any railroad or tramway, and of the plant belonging thereto (*l*).

(4) The power, upon requisition by some person recognised by him as a diplomatic representative of a foreign State with whom an arrangement has been made under the Extradition Act, 1870, for the surrender of a fugitive criminal from such foreign State suspected of being in the United Kingdom, by order under his hand and seal to signify to a police magistrate (or certain other officials in appropriate cases) the fact that such a requisition has been made, and to require him to issue his warrant for the apprehension of the fugitive criminal (*m*).

(5) The power to confirm bye-laws made by local authorities for regulating advertising structures exceeding twelve feet in height, and advertisements which affect injuriously the amenities of a public park or pleasure promenade or disfigure the natural beauty of a landscape (*n*).

(6) The power, by arrangement with the Board of Trade, to issue

the papers of the author (not named) of a seditious libel (*Wilkes* v. *Wood* (1763), 19 State Tr. 1153), and to seize the papers of the author (named) of a seditious libel (*Entick* v. *Carrington* (1765), 19 State Tr. 1029) are illegal.

(*i*) Post Office (Offences) Act, 1837 (7 Will. 4 & 1 Vict. c. 36), s. 25, which is repealed as from May 1st, 1909, when the reference will be to s. 56 (2) of the Post Office Act, 1908 (8 Edw. 7, c. 48); and see title POST OFFICE.

(*k*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 52. The warrant is only valid for one week from its issue, but successive warrants may be issued from week to week so long as, in the opinion of a Secretary of State, the emergency continues. Government departments have priority for their messages when they require it (*ibid.*, s. 48); and see title TELEGRAPHS AND TELEPHONES.

(*l*) Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86), s. 16. The warrant is only valid for one week, but successive warrants may be issued from week to week so long as, in the opinion of a Secretary of State, the emergency continues. Such compensation for loss or injury sustained by the exercise of this power is payable as may be agreed between the person or body of persons whose undertaking has been taken possession of, or, in case of difference, as may be settled by arbitration under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18) (*ibid.*). Traffic for naval and military purposes has precedence over any other traffic whenever an order for the embodiment of the militia is in force if a Secretary of State makes an order to that effect, whereupon an officer of His Majesty's naval or military forces, acting under the authority of a Secretary of State (or the Admiralty), may by warrant require that such traffic as may be specified in the warrant may have priority over other traffic (National Defence Act, 1888 (51 & 52 Vict. c. 31), s. 4 (1), (2)). Such warrant is only valid for one month, unless renewed (*ibid.*, s. 4 (4)). As to compensation and remuneration, see *ibid.*, s. 4 (6), (7); and see title ROYAL FORCES.

(*m*) Extradition Act, 1870 (33 & 34 Vict. c. 52), ss. 2, 7, 16; extended as to the meaning of "diplomatic representative," and the jurisdiction conferred on magistrates and sheriffs, by the Extradition Act, 1873 (36 & 37 Vict. c. 60), ss. 7, 6, respectively. See, generally, title EXTRADITION AND FUGITIVE OFFENDERS.

(*n*) Advertisements Regulation Act, 1907 (7 Edw. 7, c. 27), ss. 2, 6. Under s. 6 the Secretary for Scotland is substituted as to Scotland for a Secretary of State.

SECT. 6. The Secretariat.

and collect any of the forms under the Census of Production Act, 1906, as respects any factory, workshop, mine, or quarry; also, by a similar arrangement, to cause any statistical returns which he is authorised to obtain under any other Acts with regard to such matters or industries to be collected at the same time, and if convenient on the same forms, as returns under the above Act (*o*).

(7) The exclusive power to make rules relating to leave of absence (except in certain colonies) of persons employed in the public service of any colony (*p*).

(8) As to all theatres, music halls, and other places of public resort as defined by the Act being in use on the 22nd July, 1878, and not under the jurisdiction of the Lord Chamberlain of the Household, the power to consent to notices being given by the London County Council to the owners as to alterations which the latter body may think necessary, under the provisions of the Act, to remedy structural defects which may result in special danger from fire to the public (*q*).

Also, as to all theatres not under the jurisdiction of the Lord Chamberlain, the power to rescind or alter any rules made by the justices of the peace at special licensing sessions under the powers of the Theatres Act, 1843; and to make other rules for the like purposes (*r*).

(9) As to compensation for damage done by persons riotously and tumultuously assembled together, the power to make, revoke, and vary regulations respecting the time, manner, and conditions in and under which claims for compensation may be made (*s*).

Miscellaneous powers.

112. Powers are also conferred upon a Secretary of State as to a variety of miscellaneous matters (*t*).

(*o*) Census of Production Act, 1906 (6 Edw. 7, c. 49), s. 5. The Board of Trade, after consultation with the Secretary of State, may make certain rules under the Act (*ibid.*, s. 8). The intervals between returns under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 130, may be the same as for the census of production under the above Act if the Secretary of State so directs (*ibid.*, s. 10).

(*p*) Colonial Officers (Leave of Absence) Act, 1894 (57 & 58 Vict. c. 17), s. 1 (1). The excepted colonies are those given in the schedule, or in any Order in Council extending the same (see Orders in Council, Stat. R. & O. Rev., Nos. 111, 1050, extending the Schedule to the Transvaal, Australia, and the Orange River Colony). Persons employed as above may not be absent except in accordance with the rules.

(*q*) Metropolis Management and Building Acts Amendment Act, 1878 (41 & 42 Vict. c. 32), s. 11, as virtually amended as to the transfer of powers from the Metropolitan Board of Works by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (8). The consent of a Secretary of State is a necessary preliminary to notice (*ibid.*). See also, generally, title THEATRES.

(*r*) Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 9, and see, generally, title THEATRES.

(*s*) Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), s. 3 (2). Claims not made in accordance with the regulations may be excluded (*ibid.*). See, generally, title CRIMINAL LAW AND PROCEDURE.

(*t*) See titles ALIENS, Vol. I., p. 301 (naturalization); ANIMALS, Vol. I., p. 363 (vivisection; wild birds); BUILDING SOCIETIES, Vol. III., p. 321; BURIAL AND CREMATION, Vol. III., p. 401; COMMONS, Vol. IV., p. 441; COUNTY COURTS (committals to prison); CRIMINAL LAW AND PROCEDURE (convicts' property; forfeiture; costs of prosecutions; criminal lunatics; police; riot etc.); EDUCATION

SECT. 7.—*Legal Representatives and Advisers of the Crown.*

SECT. 7. Legal Representatives etc. of the Crown.

SUB-SECT. 1.—*The Attorney-General and Solicitor-General.*

113. The King cannot appear in his own courts to support his interests (*a*) in person, but is represented by his attorney (*b*), who bears the title of His Majesty's Attorney-General (*c*).

The Attorney-General.

The Attorney-General is primarily an officer of the Crown, and in that sense only an officer of the public (*d*). But, although he performs to some extent high judicial functions (*e*) at common law, he is, when exercising them, in no case a court in the ordinary sense, so that prohibition will not lie against him (*f*).

The Solicitor-General.

In his absence or incapacity, the duties devolve upon the Solicitor-General (*g*), who also represents the Crown where distinct interests require to be separately represented (*h*).

(industrial schools); EXPLOSIVES; FACTORIES AND WORKSHOPS; HIGHWAYS, STREETS AND BRIDGES; HUSBAND AND WIFE (marriages); INFANTS (employment of children); INNS AND INNKEEPERS; INTOXICATING LIQUORS; LOCAL GOVERNMENT; LUNATICS AND PERSONS OF UNSOUND MIND; MARKETS AND FAIRS; MASTER AND SERVANT (councils of conciliation); METROPOLIS (police etc.); MINES; POOR LAW; PRISONS AND REFORMATORIES; PUBLIC HEALTH ETC.; RAILWAYS AND CANALS; STREET TRAFFIC; THEATRES; TRADE AND TRADE UNIONS.

(*a*) In *R.* v. *Gregory* (1672), 2 Lev. 82, a declaration *quod dominus rex venit coram domino rege* was allowed after some demur, but characterised by HALE, C.J., as "well enough, but unmannerly."

(*b*) *R.* v. *Austen* (1821), 9 Price, 142, n. "The King sues by his attorney" or "The Attorney sues for the King" are only different forms of expressing the same thing. It is the Sovereign who, by his attorney, gives the court to understand and be informed of the matter which is being brought to its notice (*Wilkes* v. *R.* (1768), Wilm. 322, H. L., at p. 327; see, too, *A.-G. for Prince of Wales* v. *St. Aubyn* (*Bart.*) (1811), Wight. 167).

(*c*) Compare note (*g*), *infra*.

(*d*) *A.-G.* v. *Brown* (1818), 1 Swan. 265, 294; *R.* v. *Wilkes* (1770), 4 Burr. 2527, 2570.

(*e*) *R.* v. *Comptroller-General of Patents*, [1899] 1 Q. B. 909, C. A.

(*f*) *Re Van Gelder's Patent* (1888), 6 R. P. C. 22, 27, C. A.

(*g*) The title seems to point to the fact that originally the Attorney-General represented the Crown in the common law courts and the Solicitor-General in chancery (*Wilkes* v. *R.* (1768), Wilm. 322, H. L., at p. 330; *S.-G.* v. *Bath Corporation* (1849), 18 L. J. (CH.) 275; *S.-G.* v. *Law Reversionary Interest Society* (1873), L. R. 8 Exch. 233). The Interpretation Act, 1889 (52 & 53 Vict. c. 63), does not deal with the Law Officers, but the expression "the Attorney-General" is recognised in numerous statutes as including the Solicitor-General in cases where such inclusion or substitution is necessary (see Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 5; Prosecution of Offences Act, 1879 (42 & 43 Vict. c. 22), s. 9; Explosive Substances Act, 1883 (46 Vict. c. 3), s. 9; Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 64; Official Secrets Act, 1889 (52 & 53 Vict. c. 52), s. 7 (2); and Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 24). With regard to the Lord Advocate and the Solicitor-General for Scotland, see the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 73, and the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 76. With regard to the Attorney-General and Solicitor-General for Ireland, see the Prevention of Crime (Ireland) Act, 1882 (45 & 46 Vict. c. 25), s. 35, and the Criminal Law and Procedure (Ireland) Act, 1887 (50 & 51 Vict. c. 20), s. 19. As to the effect of a change of Attorney-General during proceedings, see *Hamilton* v. *A.-G.* (1880), 7 L. R. Ir. 223; (1881) 9 L. R. Ir. 271, C. A.; and as to Scotland, the Crown Suits (Scotland) Act, 1857 (20 & 21 Vict. c. 44), s. 5.

(*h*) *A.-G.* v. *Galway Corporation* (1829), 1 Mol. 95, 101, n.; *A.-G.* v. *Windsor* (*Dean and Canons*) (1860), 8 H. L. Cas. 369; and see other instances

SECT. 7. Legal Representatives etc. of the Crown.

114. The Crown is represented by separate Law Officers for Scotland, under the titles of the Lord Advocate and the Solicitor-General for Scotland, and for Ireland by the Attorney-General and Solicitor-General for Ireland. There are also separate Law Officers for Lancaster and Durham (*i*). The Attorney-General for England has precedence of the Lord Advocate, even on the hearing of Scottish appeals in the House of Lords (*k*).

Appointment and salaries.

115. The office is conferred by patent, and is held during pleasure. Neither the Attorney-General nor the Solicitor-General for England may engage in private practice. The Attorney-General enjoys at present a salary of £7,000 per annum and certain fees, while the Solicitor-General receives £6,000 a year as salary and fees (*a*).

The Attorney-General in the courts.

116. The Attorney-General is the head of the Bar (*b*), and has precedence over all King's counsel. Generally speaking, however, he has no greater legal rights than other members of the Bar, in so far that he or any person appointed to act for him must conform to the rules of the court in which the proceeding in which he is engaged takes place, the courts exercising over him the same authority which they exercise over every other suitor or his advocate (*c*). He would not be permitted to prosecute any proceeding which was merely vexatious, or which had no legal object (*d*). Where a prerogative is claimed on behalf of the Crown, it is for the representatives of the Crown clearly to establish it, where they claim to be on a different footing from the subject as regards procedure (*e*), or, it seems, in any other respect. The opinion of the Attorney-General is, in the eyes of the court, entitled to no more authority than that of any other member of the Bar (*f*). No general right of reply on the part of the Attorney-General is recognised by the courts (*g*).

cited in Robertson, Civil Proceedings by and against the Crown, p. 15. See also *Ellis* v. *Bedford* (*Duke*), [1899] 1 Ch. 494, C. A., at pp. 504, 518; *A.-G.* v. *Richmond* (*Duke*) (No. 2), [1907] 2 K. B. 940.

(*i*) See p. 76, *post*.

(*k*) *A.-G.* v. *Lord Advocate* (1834), 2 Cl. & Fin. 481, 485, H. L.

(*a*) See Treasury Minute, 5th July, 1895. Under this regulation the salaries of the Attorney and Solicitor General respectively were increased, their right to engage in private practice ceasing contemporaneously.

(*b*) *R.* v. *Comptroller-General of Patents*, [1899] 1 Q. B. 909, C. A. See title BARRISTERS, Vol. II., p. 387.

(*c*) *E.g.*, the Attorney-General has no right to usurp the functions of the judge in directing the jury as to the law.

(*d*) *R.* v. *Prosser* (1848), 11 Beav. 306; see also *A.-G.* v. *Horne* (1777), 20 State Tr. 651, at p. 740; *R.* v. *Hunt* (1820), 1 State Tr. (N. S.) 171, at p. 315; *Tobin* v. *R.* (1863), 32 L. J. (C. P.) 216, at p. 224.

(*e*) *A.-G. to the Prince of Wales* v. *Crossman* (1866), L. R. 1 Exch. 381, at p. 386; and see *Nireaha Tamaki* v. *Baker*, [1901] A. C. 561, P. C., at p. 576.

(*f*) *R.* v. *Hunt* (1820), *supra*.

(*g*) This is clearly so in the House of Lords (*Lord Advocate* v. *Dunglas* (1841), 9 Cl. & Fin. 173, H. L.; see also *O'Connell* v. *R.* (1844), 11 Cl. & Fin. 155, at p. 185, H. L.). In the King's Bench the matter is doubtful. In *R.* v. *Treasury Commissioners* (1851), 16 Q. B. 357, the Attorney-General was heard in reply on his suggestion that the reply should be by consent, but on condition that it should be considered neither an exercise of the right on the part of the Crown,

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Admissions by the Attorney-General bind the Crown as to matters of fact, but not as to matters of law (*h*).

It appears that the court has no power to compel the Attorney-General to be examined as a witness (*i*).

117. The Attorney-General represents the Crown in the courts in all matters in which rights of a public character come into question (*k*), and is, therefore, the representative and legal adviser of all public departments which have capacity to sue and be sued (*l*), as well as of departments which have no such capacity (*m*). He is a necessary party to the assertion of public rights even where the moving party is a private individual (*n*); though it is otherwise, it seems, where a public body (such as the London County Council) are intrusted by statute with the control and management of matters relating to the public welfare (*o*).

Public rights.

118. The Attorney-General and Solicitor-General are summoned, together with the judges, to attend the House of Lords at the beginning of every Parliament (*p*).

House of Lords.

In peerage cases, the claim being made by petition to the Crown, the petition is referred to the Attorney-General for report, and he may advise the Crown to refer it to the House of Lords, sitting as a

Peerage cases.

nor an acknowledgment on his part as Attorney-General that such a right did not exist; see too *R.* v. *Canterbury* (*Archbishop*) (1848), 11 Q. B. 483, at p. 560, n. For the practice in revenue cases, see *Chandos* (*Marquis*) v. *Inland Revenue Commissioners* (1851), 6 Exch. 464, at p. 478, and Robertson, Civil Proceedings by and against the Crown, pp. 12, 13. With regard to criminal cases, see the resolution of the judges printed in Taylor on Evidence, 10th ed., p. 302, n., "that in those Crown cases in which the Attorney-General and Solicitor-General are personally engaged, a reply, where no witnesses are called for the defence, is to be allowed, as of right, to the counsel for the Crown, and no others"; see also title BARRISTERS, Vol. II., pp. 411, 414, 416.

(*h*) *A.-G.* v. *Bagg* (1658), Hard. 125; *Wall* v. *Pennington* (1660), Hard. 170.

(*i*) *A.-G.* v. *Horne* (1777), 20 State Tr. 651, at p. 740; as to the admissibility of the Sovereign's evidence, see Vol. VI., p. 410.

(*k*) See titles CHARITIES, Vol. IV., p. 101; LUNATICS AND PERSONS OF UNSOUND MIND; PATENTS AND INVENTIONS.

(*l*) *E.g.*, the Board of Trade.

(*m*) In the latter case the procedure is by information, as to which see title CROWN PRACTICE.

(*n*) *A.-G.* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (1882), 21 Ch. D. 752; *A.-G.* v. *Ashborne Recreation Ground*, [1903] 1 Ch. 101; *A.-G.* v. *Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34; *Boyce* v. *Paddington Borough Council*, [1903] 2 Ch. 556, C. A. The jurisdiction of the Attorney-General to decide in what cases it is proper for him to sue on behalf of relators is absolute (*London County Council* v. *A.-G.*, [1902] A. C. 165). As to relator actions generally, see title PRACTICE AND PROCEDURE.

(*o*) *London County Council* v. *South Metropolitan Gas Co.*, [1904] 1 Ch. 76, C. A., where in an action by plaintiffs against the company (incorporated under private Acts) for a declaration affirming their rights to test gas meters on Sundays, and for an injunction restraining the defendants from interfering, it was held that the Attorney-General was not a necessary party.

(*p*) They are summoned as members of the ancient *concilium regis* (4 Co. Inst. 4), their places being among such persons as are under the degree of a baron of Parliament (stat. 31 Hen. 8, c. 10 (1539), s. 8; House of Lords' Standing Orders, 6, 7; May, Parliamentary Practice, 198). Although they are summoned to Parliament, their opinion is not taken by the House of Lords sitting as the highest appellate tribunal.

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Committee for Privileges. On the hearing of the petition the Attorney-General attends as assistant to the committee (*q*).

The Attorney-General acts as prosecutor both for the House of Lords and for the House of Commons. In the case of offences directly concerning the House, the House directs the Attorney-General to prosecute; in the case of offences not directly concerning the House, the House addresses to the Crown a request that the Attorney-General be directed to prosecute (*r*).

Nolle prosequi.

119. The Crown, being always present in court, cannot be non-suited (*s*), but the Attorney-General has power to enter a *nolle prosequi* on any indictment (*t*), and can do so without calling upon the prosecutor to show cause why that should not be done, although in practice he summons the parties and hears them before granting a fiat (*u*). The right to enter a *nolle prosequi* extends to civil proceedings (*v*).

Criminal matters.

120. In connection with the administration of the criminal law, the Attorney-General and Solicitor-General are included in the commission of the peace for every county, riding and division. The Attorney-General is instructed (*w*) to prosecute in important cases. He has the right to file criminal informations *ex officio* for misdemeanour (*a*).

Trial at Bar.

121. He is entitled to demand a trial at Bar as of right (*b*) where

(*q*) *Saye and Sele* (*Barony*) (1848), 1 H. L. Cas. 507. It is said that the Attorney-General is entitled to sit within the bar (*ibid.* 511, n.). See, generally, titles COURTS; DIGNITIES.

(*r*) May, Parliamentary Practice, 76, and Journals there referred to.

(*s*) Bro. Abr. tit. Nonsuit, 68, though an informer suing *qui tam* could be (*ibid.*); and see p. Vol. VI., p. 410.

(*t*) For an early instance, see 4 Co. Inst. 20.

(*u*) *R.* v. *Allen* (1862), 1 B. & S. 850. A *nolle prosequi* can only be entered by the Attorney-General, not by a private prosecutor (*R.* v. *Dunn* (1843), 1 Car. & Kir. 730). It can be entered after, as well as before, verdict (*R.* v. *Leatham* (1861), 30 L. J. (Q. B.) 205).

(*v*) See *R.* v. *Evans* (1819), 6 Price, 480. As to discontinuance or other proceedings for want of prosecution or pleading by the Attorney-General, see *A.-G.* v. *Farnham Town* (1669), Hard. 504 (*quo warranto*); *R.* v. *Musters* (1744), Park. 50 (*scire facias*); *A.-G.* v. *Richards* (1796), 3 Anst. 753 (information of seizure, where the goods seized were suffering owing to delay by the Attorney-General; the court granted the application to dismiss after notice to the Attorney-General and no cause shown); *A.-G.* v. *Eyton* (1818), 6 Price, 85 (want of reply by Attorney-General on an information; motion by defendant to "go without day" adjourned to search for precedents); *R. v. Slee* (1825), M'Cle. & Yo. 361 (extent, want of reply by Attorney-General; no reply by Attorney-General ordered without previous application for a reply to the Attorney-General); see also *Peto* v. *A.-G.* (1827), 1 Y. & J. 509 (answer to a bill against the Attorney-General ordered within a week, otherwise judgment *pro confesso*); *R.* v. *Ray* (1842), 9 M. & W. 760 (rule to show cause why the defendants should not set down the cause for trial dismissed). For forms of satisfaction warrant, *nolle prosequi* judgment, and confession, see Robertson, Civil Proceedings by and against the Crown, pp. 218, 797, 800.

(*w*) As to the Director of Public Prosecutions, see p. 78, *post*.

(*a*) Com. Dig. tit. Information; 2 Co. Inst. 424; Fitz. Nat. Brev. 241 a, and see title CRIMINAL LAW AND PROCEDURE.

(*b*) Crown Office Rules, 1906, r. 151; *R.* v. *Johnson* (1825), 1 Stra. 643; *R.* v. *Hales* (1728), 2 Stra. 816; *Rowe* v. *Brenton* (1828), 3 Man. & Ry. (K. B.) 133;

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the Crown is interested (*c*); if he waive the right, he is entitled to have the *venue* changed to any county in which he elects to have the cause tried (*d*).

Administrative functions.

122. The Attorney-General performs administrative functions in connection with the grant of letters patent for inventions, the discretion of the Crown being exercised through him. The Comptroller-General of Patents, Designs, and Trade Marks may also apply either to him or the Solicitor-General for directions in any case of doubt and difficulty arising in the administration of any of the provisions of the Patents and Designs Act, 1907 (*e*). His certificate on fiat is necessary in many cases before proceedings in which the Crown may be interested can be initiated (*f*). His decision is conclusive (*g*), so that no mandamus will lie to compel him to grant a fiat, except in the event of his refusing to hear an application (*h*). The fiat cannot, however, be arbitrarily withheld (*i*).

Political position.

123. The Attorney-General and Solicitor-General, the Lord Advocate and Solicitor-General for Scotland, and the Attorney-General and Solicitor-General for Ireland are members of the ministry, but not of the Cabinet (*j*). The Lord Advocate alone is, under the present practice, a member of the Privy Council. The Attorney-General and Solicitor-General for Ireland are members of the Privy Council of Ireland.

The acceptance of any of the above offices necessitates re-election

Dixon v. *Farrer* (1886), 18 Q. B. D. 43, C. A. The application of the Attorney-General for a trial at bar cannot be refused, the court relying on his discretion (*A.-G.* v. *Walsh* (1832), Hayes & Jo. 65). The rule for a trial at bar when granted on the application of the Attorney-General is absolute in the first instance (Crown Office Rules, 1906, r. 151; *Paddock* v. *Forrester* (1840), 1 Man. & G. 583), but it is open to the other party to show subsequently that the Attorney-General has been misinformed, and that the Crown is not interested, whereupon the rule will be set aside (*Dixon* v. *Farrer*, *supra*). The court may make the order at the instance of a private prosecutor, although the Attorney-General decline to interfere (*Anderson* v. *Gorrie* (1894), 10 T. L. R. 383, C. A.). The right to a trial at bar is not taken away by the Judicature Acts, the trial being now by a divisional court (*Anderson* v. *Gorrie*, *supra*; *Dixon* v. *Farrer*, *supra*).

(*c*) The interest of the Crown need not be such as to affect the property of the Crown directly, or the property of the Crown as head of the State (*Bellamont's (Lord) Case* (1700), 2 Salk. 625; *Dixon* v. *Farrer*, *supra*). The Attorney-General is entitled to a trial at bar where the interests of the Crown as Duke of Lancaster come into question (*Brown* v. *Granville* (*Lord*) (1835), 1 Har. & W. 270).

(*d*) Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 46 (1); *Dixon* v. *Farrer*, *supra*.

(*e*) Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 74; and see, generally, titles COPYRIGHT AND LITERARY PROPERTY; PATENTS AND INVENTIONS.

(*f*) See title CHARITIES, Vol. IV., pp. 313, 333. In the case of a petition of right, the fiat is that of the Crown, and is communicated through the Home Secretary. The function of the Attorney-General is merely to advise the Crown as to whether the claim is one which ought to be investigated. See title CROWN PRACTICE.

(*g*) *R.* v. *Comptroller-General of Patents*, [1899] 1 Q. B. 909, C. A.; *Ex parte Newton* (1855), 4 E. & B. 869.

(*h*) *Ex parte Newton*, *supra*; *Ex parte Costello* (1868), 2 I. R. C. L. 380.

(*i*) See title CROWN PRACTICE.

(*j*) See p. 38, *ante*.

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to the House of Commons (*k*), except where the holder of any one of them, being a member of the House, subsequently accepts any other of such offices (*l*).

SUB-SECT. 2.—*The Attorney-General of the Duchy of Lancaster.*

Appointment and precedence.

124. The Attorney-General of the Duchy of Lancaster is appointed by patent under the seal of the Duchy of Lancaster (*m*) to represent the interests of the Crown in respect of the Duchy (*n*). He has not precedence over any of his seniors at the Bar, except in the courts of the Duchy (*o*).

Powers.

125. The privileges conferred by the patent are confined to the courts of the Duchy. The Attorney-General for the Duchy has therefore no power to exhibit an information in the High Court (*p*). In proceedings in the High Court the rights of the Crown are sufficiently represented by the King's Attorney-General, if he is participating in the proceedings, whether the right be claimed under the prerogative of the Crown or in respect of the Duchy of Lancaster (*q*).

SUB-SECT. 3.—*The Attorney and Solicitor General of the County Palatine of Durham.*

County palatine of Durham.

126. In causes falling within the jurisdiction of the Chancery Court of Durham the Crown is represented by the Attorney or Solicitor General of the county palatine of Durham (*r*).

127. As to precedence and privileges, similar principles are applicable (it is apprehended) to the law officers of the Durham Palatine Court, as in the case of the Attorney-General of the Duchy of Lancaster (*s*).

128. Original writs and other judicial processes in the Chancery Court of Durham are no longer tested as formerly in the name of

(*k*) Succession to the Crown Act, 1707 (6 Ann. c. 41; c. 7, Ruff.), s. 26; and see p. 40, *ante*.

(*l*) Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 52, Sched. H; Representation of the People (Scotland) Act, 1868 (31 & 32 Vict. c. 48), s. 51, Sched. H; Representation of the People (Ireland) Act, 1868 (31 & 32 Vict. c. 49), s. 11, Sched. E. The duties of the Law Officers in the House of Commons are incapable of precise enumeration. They advise the Government generally on legal questions and support them in debate when such questions are under discussion.

(*m*) *A.-G. of Duchy of Lancaster* v. *Devonshire* (*Duke*) (1884), 14 Q. B. D. 195.

(*n*) As to which, see 4 Co. Inst. 206; *Case of the Duchy of Lancaster* (1562), Plowd. 212; and p. 217, *post*.

(*o*) *A.-G.* v. *Lord Advocate* (1834), 2 Cl. & Fin. 481, at p. 487, n., H. L.; *Paddock* v. *Forrester* (1842), 3 Man. & G. 903, at p. 920, n.

(*p*) *A.-G. of Duchy of Lancaster* v. *Devonshire* (*Duke*), *supra*. Where an action was brought in the County Palatine Court for the purpose of asserting the claim of the Crown to lands alleged to be part of the Duchy, the question whether the proceedings ought to be by information, and not by action, was not decided (*A.-G. of Duchy of Lancaster* v. *London and North Western Rail. Co.*, [1892] 3 Ch. 274, C. A.).

(*q*) *Re Kershaw* (1882), 21 Ch. D. 613, C. A.

(*r*) As to the Chancery Court in Durham generally, see titles COURTS; PRACTICE AND PROCEDURE.

(*s*) As to these, see *supra*.

the bishop as owner of the franchise of the county palatine, but in the name of the Sovereign (*t*).

129. With the concurrence of the Lord Chancellor of Great Britain, the Chancellor of the Palatine Chancery Court is empowered by rules or orders from time to time to adopt all or any of the rules, orders, or regulations made for the High Court of Justice under the Judicature Acts, with variations or additions necessary or proper for adapting the same to the business of the Palatine Court (*u*).

SUB-SECT. 4.—*Other Legal Officials.*

Solicitors to public departments.

130. All persons appointed to act as solicitors on behalf of the Crown under the directions of the Treasury, Inland Revenue, or Customs Commissioners, or of any commissioners or other persons having the management of any other branch of the revenue (*x*), may act and practise as solicitors in any place within the United Kingdom without complying with the conditions to which solicitors are ordinarily subject as to admission, certificates, or otherwise (*x*). In addition to these persons, the solicitors to the Post Office, the Admiralty and the War Office are exempt from the provisions of the Solicitors Act, 1843 (*y*). Solicitors to public departments, including the department of the Ecclesiastical Commissioners and of the Governors of Queen Anne's Bounty (*z*), and the clerks or officers appointed to act for the solicitor of any such public department, are generally exempted from the provisions of the Attorneys and Solicitors Act, 1874 (*z*). The person appointed by the Prince of Wales to act as solicitor to the Duchy of Cornwall is entitled to practise as such solicitor for the affairs of the Duchy without conforming to the regulations imposed upon solicitors by the Solicitors Acts (*a*).

(*t*) Stat. (1535) 27 Hen. 8, c. 24, s. 3, and see Vol. VI., p. 400; and as to the revesting of palatine rights in the Crown, p. 216, *post*.

(*u*) Palatine Court of Durham Act, 1889 (52 & 53 Vict. c. 47), s. 1.

(*x*) Revenue Solicitors Act, 1828 (9 Geo. 4, c. 25), s. 1. See also the Attorneys and Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12, and the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 33. Pleadings delivered by a person purporting to have been appointed solicitor on behalf of the Crown under the directions of the Commissioners of Inland Revenue cannot be treated as a nullity because they do not contain an allegation to the effect that revenue matters are in question (*West* v. *Taunton* (1830), 6 Bing. 404).

(*y*) 6 & 7 Vict. c. 73, s. 47.

(*z*) 37 & 38 Vict. c. 68, s. 12. The section exempts clerks or officers from the penalties imposed upon persons who are not duly qualified, but does not expressly confer the right to act and practise as a solicitor in any court. Such rights are expressly conferred upon persons acting as clerks to the Solicitor and Assistant Solicitor of Customs with regard to any court, and upon such clerks and upon any officer of customs with regard to proceedings before justices (Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 273). See, too, as to clerks or officers of the Commissioners of Inland Revenue, the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 27. The Finance Act, 1896 (59 & 60 Vict. c. 28), s. 38, confers upon any person who has been admitted a solicitor, and is authorised by the Commissioners or the Solicitor of Inland Revenue, the right of audience in any county court in England or Ireland; and see, generally, title SOLICITORS.

(*a*) Stannaries Act, 1855 (18 & 19 Vict. c. 32), s. 31. The Solicitor to the Duchy of Lancaster has received no statutory recognition other than that

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Treasury Solicitor.

131. The Treasury Solicitor is a corporation sole, his official style being that of Solicitor for the affairs of His Majesty's Treasury. He has perpetual succession by that name, with a capacity to acquire and hold in that name lands, Government securities, shares in any public company, securities for money and real and personal property of every description. He has capacity to sue and be sued, to execute deeds, make leases, to enter into engagements binding on himself and his successors in office, and to do all other acts necessary or expedient to be done in the execution of the duties of his office (*b*). He has an official seal, and any document purporting to be sealed with such seal is receivable in evidence of the particulars therein stated (*c*). The Treasury Solicitor acts for the Crown in matters falling within his department (*d*). He may also, by direction of the Crown, act in cases where a person in a public capacity is a party to proceedings in which the Crown has an interest (*e*).

Assistant solicitor.

132. An assistant solicitor for the affairs of His Majesty's Treasury may, on behalf of the Treasury Solicitor, take any oath, make any declaration, verify any account, execute any deed, or do any act or thing which the Treasury Solicitor, in the exercise of his duties as Treasury Solicitor, is required or authorised to take, make, verify, execute, or do (*f*).

Director of Public Prosecutions.

133. The Director of Public Prosecutions is appointed by a Secretary of State, who may also appoint such number of assistant directors as the Treasury sanction (*g*). A person cannot be appointed to be Director of Public Prosecutions unless he be a barrister or solicitor of not less than ten years' standing, or to be an assistant director unless he be a barrister or solicitor of not less than seven years' standing (*h*). An assistant director may do any act or thing which the Director is required or authorised to do by or in pursuance of any Act of Parliament or otherwise (*i*).

contained in the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 8; and see *In the Goods of Best*, [1901] P. 333.

(*b*) Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), s. 1.

(*c*) *Ibid.*

(*d*) For his duties in connection with the administration of the personal estate of intestates to which the Crown has become entitled, see the Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), ss. 2, 4, 7, and the rules dated 26th April, 1877, made thereunder (Statutory Rules and Orders Revised, Vol. XIII.); Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 81; and title DESCENT AND DISTRIBUTION.

(*e*) He is, by virtue of his appointment, a duly qualified solicitor. A litigant, therefore, for whom he acts as solicitor by direction of the Crown, is entitled to recover costs (*R.* v. *Canterbury* (*Archbishop*), [1903] 1 K. B. 289, C. A., at p. 292).

(*f*) Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), s. 3.

(*g*) Prosecution of Offences Act, 1908 (8 Edw. 7, c. 3), s. 1 (1). The salary of the Director and of such assistant directors as may be appointed is determined by the Treasury (*ibid.*, s. 1 (2)). All such salaries and remuneration, and any expenses incurred in the execution of the duties of the Director of Public Prosecutions which are not otherwise provided for, are to be paid out of moneys provided by Parliament (*ibid.*, s. 1 (3)).

(*h*) *Ibid.*, s. 1 (4).

(*i*) *Ibid.*, s. 1 (5). For the powers and duties of the Director of Public Prosecutions, see title CRIMINAL LAW AND PROCEDURE.

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134. The Official Solicitor is not a legal representative or adviser of the Crown (*j*).

135. The King's Proctor represents the Crown in Admiralty and matrimonial causes. The office is at present held by the Treasury Solicitor.

The King's Proctor.

In Admiralty the King's Proctor acts for the Crown in proceedings for the recovery of droits of Admiralty (*k*).

In matrimonial causes the court may in every case of a petition for a dissolution of marriage (*l*) or for nullity (*m*) direct all necessary papers to be sent to the King's Proctor, who is required, under the directions of the Attorney-General, to instruct counsel to argue before the court any question in relation to such matter, which the court may deem it necessary or expedient to have fully argued. The King's Proctor is entitled to be reimbursed the costs of such proceedings (*n*).

The King's Proctor has power to intervene at any time during the progress of a cause (*o*) or before the decree is made absolute, under the direction of the Attorney-General, and by leave of the court, in any suit for divorce, if he desires to allege collusion, and to retain counsel and subpœna witnesses to prove it. The court has power to order the costs occasioned by such intervention to be paid by the parties to the suit, or such of them as it may think fit, including a wife, if she have separate property. In the event of his costs remaining unsatisfied, he is entitled to be reimbursed such part of them as may remain unsatisfied as part of the expense of his office (*p*).

The King's Proctor may intervene to show cause against a decree *nisi* being made absolute, on the ground that material facts have not been brought before the Court (*q*).

SECT. 8.—*The Departments of State.*

SUB-SECT. 1.—*In General.*

Government offices.

136. The various Government offices and departments, through the medium of which the general executive administration of the country is carried on, owe their creation and present internal

(*j*) For his duties, see title COURTS.

(*k*) As to which see title ADMIRALTY, Vol. I., p. 76. There are no special provisions dealing with the practice in such proceedings.

(*l*) Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 5; and see title HUSBAND AND WIFE.

(*m*) Matrimonial Causes Act, 1873 (36 & 37 Vict. c. 31), s. 1.

(*n*) Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 5.

(*o*) He may, under the direction of the Attorney-General, have the proceedings watched (*Hudson* v. *Hudson* (1875), 1 P. D. 65).

(*p*) Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 7.

(*q*) *Ibid.* The King's Proctor in such case intervenes as a member of the public, and not in his official capacity (*Masters* v. *Masters* (1864), 34 L. J. (P. M. & A.) 7; *Hudson* v. *Hudson* (1875), 1 P. D. 65; and see *Latour* v. *Latour and Weston* (1861), 2 Sw. & Tr. 524; *Boulton* v. *Boulton* (1862), 31 L. J. (P. M. & A.) 76; *Bowen* v. *Bowen* (1864), 33 L. J. (P. M. & A.) 129). Where he intervenes under s. 7 of the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), alleging collusion, he may at the same time allege other matters in opposition to the making the decree absolute (*Dering* v. *Dering* (1868), L. R. 1 P. & D. 531; *Crawford* v. *Crawford* (1886), 11 P. D. 150). For the practice on intervention generally, see title HUSBAND AND WIFE.

SECT. 8. **The Departments of State.**

organisation largely to the direct exercise of the discretionary authority of the Crown as head of the executive (*r*). But, though this is so, the constitution of the more modern departments (*s*), and the powers and duties of the various officers and functionaries of whom their staff is composed, as well in the modern as in the older departments, are now principally regulated by direct parliamentary enactment, or by Orders in Council issued under statutory authority.

The heads of offices.

137. The heads and parliamentary secretaries of the political, or more important, Government departments are members of the Cabinet or ministry, appointed by the Crown upon the advice of the Prime Minister (*a*). They are, therefore, not permanent officers, but owe their official existence to the continuance in power of the political party to which they belong, and retire with every change of administration. They act as the spokesmen and defenders in Parliament of the departments which they represent, and determine the general nature of the executive policy which each department is to pursue. Moreover, being members of the ministry, they are responsible as a whole for the policy of the principal legislative measures introduced in Parliament, and which, when they become law, it will be the duty of the various departments to administer (*b*).

The minor offices.

138. The less important departments are non-political—that is to say, the head of the department is an ordinary member of the permanent Civil Service, having no voice or status in politics beyond that of the general body of the electorate of which he forms a unit. But if it be deemed expedient, a non-political may at any time become a political department by the appointment of a parliamentary head (*c*), or the reverse may be the case, and a political department may be turned into a non-political department by the non-appointment of a parliamentary head. The latter power appears, however, to be seldom or never exercised.

The Civil Service.

139. The permanent staff of every Government department is composed of members of the Civil Service, whose numbers, in the case of the majority of the offices and departments, are recruited by a system of open competitive examination held under the supervision of the Civil Service Commissioners, appointed for

(*r*) Thus, the present constitution and organisation of the War Office is entirely due to the exercise of the discretionary authority of the Crown, though the delegation of the powers of the Crown as to the supreme command has been expressly authorised by statute. See Vol. VI., p. 418, and, as to the constitution of the War Office, pp. 92 *et seq.*, *post*.

(*s*) *E.g.*, the Board of Education (see Board of Education Act, 1899 (62 & 63 Vict. c. 33), the Board of Agriculture and Fisheries (see the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), and Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31)).

(*a*) See pp. 34 *et seq.*, *ante*.

(*b*) As to the advantages said to be gained by the combination of a parliamentary head with a permanent staff, see Bagehot's English Constitution, 201 *et seq.*

(*c*) Thus, the Commissioners of Woods and Forests have recently become a political department to some extent by the inclusion of the President of the Board of Agriculture and Fisheries as an *ex officio* Commissioner of Woods.

that purpose by Order in Council, and according to rules and regulations prescribed by the Order (*d*).

The persons successful in the competitive examinations for the Civil Service pass through a period of probation (*e*), and when finally appointed hold office during the pleasure of the Crown, and are therefore dismissible at any time without cause assigned (*f*). In practice, however, they are invariably treated as permanent officials holding office during good behaviour, and are not removed except in cases of misconduct or inefficiency (*g*).

Salaries.

140. Except where they are expressly provided for by statute, the salaries of civil servants are regulated by the Crown in the exercise of its discretionary authority, and are such as may be appointed by Order in Council (*h*), or allowed by the Treasury. They appear upon the annual estimates, and are therefore subject to criticism, alteration, or disallowance by Parliament (*i*). Though their appointments may be conferred through the medium of the heads of their respective departments, all members of the Civil Service are servants of the Crown, and no contractual relation exists between them and the heads of the departments, and the latter cannot therefore be made liable in an action for the recovery of salary, the proper and, in general, the only remedy being by petition of right (*j*); nor is he liable for their torts, unless the particular tort has been specifically authorised by him (*k*).

Civil servants in Parliament.

141. Whatever their political opinions may be, the members of the Civil Service ought to remain free to serve the Government of the day without unnecessarily exposing themselves to public charges of inconsistency or insincerity. It is therefore provided that any civil servant seeking a seat in the House of Commons must resign office as soon as he has issued his address to the electors,

(*d*) The present Commissioners (two in number) were appointed by Order in Council of the 12th August, 1907, the first Commissioner being empowered to appoint such assistant examiners and others as may be required, and any Commissioner now and hereafter to be appointed may, with the previous approval of the Treasury, authorise in writing the Secretary to the Civil Service Commission to act as a Commissioner for any period during the absence or any vacancy in the office of Commissioner.

(*e*) This is (under the present rules) in general six months (see Order in Council, 21st May, 1855), but a second division clerk is to be regarded as accepted by a department if he has served twelve months therein, and a record has been made by the head of the department that his service has been approved (see Order in Council, 29th November, 1898, s. 10).

(*f*) See p. 22, *ante*.

(*g*) As to what constitutes misbehaviour in office, see p. 23, *ante*.

(*h*) *E.g.*, the salaries of second division clerks by Order in Council, 21st December, 1907.

(*i*) A large number of official salaries came under the review of a Committee of the House of Commons in 1850. For the report of the Committee and the recommendations made, see Parliamentary Papers, 1850, Vol. XV. Where it is desired to censure the conduct of the executive Government in any department, this is frequently effected by a motion to reduce the salary of a particular officer, or the amount to be voted for expenditure by a particular department.

(*j*) *Gidley* v. *Palmerston* (*Lord*) (1822), 3 Brod. & Bing. 275; see title CROWN PRACTICE. As to the right of dismissal, see p. 22, *ante*.

(*k*) See Vol. VI., p. 413.

SECT. 8. The Departments of State.

or in any other way announced himself as a candidate for election (*l*). Certain officers in public departments are also expressly debarred by statute from sitting or voting in the House of Commons (*m*); but no restriction is placed upon civil servants generally with regard to voting at parliamentary elections.

SUB-SECT. 2.—*The Home Office.*

The Home Secretary.

142. The Secretary of State for the Home Department, apart from the matters which are especially assigned to his department, performs all the functions which fell to the King's Secretary before the present departmental organisation of the executive came into existence. He is first in precedence among the Secretaries of State (*n*), and all matters which are not peculiarly appropriate to the other departments fall within his province (*o*). His powers and duties are derived from three sources, from his personal relationship to the Sovereign as his secretary, from the fact that he is the instrument through which the royal prerogative is mainly exercised, and from the authority conferred upon him by a large number of statutes.

The Home Office.

143. As a departmental officer the Home Secretary presides over the Home Office, and is assisted by two under-secretaries, one permanent and one parliamentary; by three assistant under-secretaries, and by a large staff of clerks (*p*).

The Home Office is now concerned almost entirely with England, but the affairs of the Channel Islands and of the Isle of Man fall within the scope of the Home Department (*q*).

Communication between Crown and subject.

144. The Home Secretary is the proper and usual medium of communication between Crown and subject, and signifies the pleasure of the Crown both to individuals and to departments. He notifies to certain great officials matters of State intelligence, such as declarations of war, treaties of peace, and births and deaths in the Royal Family (*r*). Addresses and petitions to the Crown in person,

(*l*) See Order in Council, 29th November, 1884 (*London Gazette*, 1884, p. 5779), approving a Treasury minute of 12th November, 1884, to the effect stated in the text.

(*m*) See note (*m*), p. 40, *ante*, and title PARLIAMENT.

(*n*) Anson, Law and Custom of the Constitution, 2nd ed., Vol. II., 229.

(*o*) "The Home Office is a kind of residuary legatee" (Lowell, Government of England, Vol. I., 105).

(*p*) The office is divided into three main divisions, criminal, domestic and general, and contains a number of departments to which inspectors are attached, such as the Factory Department and the Prison Commission. Inspectors are also appointed under the Reformatory and Industrial Schools Acts, the Aliens Act, and the Cruelty to Animals Act, as well as inspectors of coal and metalliferous mines, of explosives, of anatomy, and of county and borough constabulary. See titles ALIENS, Vol. I., p. 301; ANIMALS, Vol. 1., p. 363; EXPLOSIVES; FACTORIES AND WORKSHOPS; MINES, MINERALS, AND QUARRIES; PRISONS AND REFORMATORIES; etc.

(*q*) As to Scotland, see p. 98, *post*, and as to Ireland, p. 99, *post*. Formal expression of the will of the Crown, in matters relating to Ireland, is given through the Home Office.

(*r*) The classification is adopted from Anson, Law and Custom of the Constitution, 2nd ed., Vol. II., 228, 229 *et seq.*

as opposed to the Crown in Council, are received and transmitted by him (*s*). Thus, petitions for the exercise of the prerogative of mercy are addressed to him (*a*); and where a subject desires to prosecute a claim against the Crown, the petition of right by which proceedings are commenced is lodged with him (*b*).

In the majority of cases in which formal expression is to be given to the will of the Sovereign, it is the duty of the Home Secretary to cause the necessary document to be prepared, and to countersign it (*c*).

He is the proper medium of communication between the Sovereign and the Church (*d*).

Internal administration.

145. The Home Secretary is primarily concerned with matters of administration affecting the internal well-being of the country, so far as such matters have not been especially delegated to other departments, and he has large powers of administration, supervision, and control under a variety of statutes (*e*).

He is *ex officio* a member of the Board of Trade, the Local Government Board, and the Board of Agriculture and Fisheries (*f*).

Maintenance of public order.

146. The maintenance of public order falls within the department of the Home Secretary (*g*). His powers in this respect may be classified as follows :—

(1) He has power to commit persons charged with treason (*h*),

(*s*) Anson, Law and Custom of the Constitution, 2nd ed., Vol. II., 229.

(*a*) The Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), expressly enacts (s. 19) that nothing in the Act contained shall affect the prerogative of mercy, but gives power to the Secretary of State, if he thinks fit, either to refer the whole case to the Court of Criminal Appeal, or to refer to that court for its opinion any point arising in the case with a view to the determination of the petition.

(*b*) See title CROWN PRACTICE. No action lies against the Secretary of State for refusing his fiat (*Irwin* v. *Grey* (1862), 3 F. & F. 635).

(*c*) Three classes of royal warrants are submitted to the Sovereign from the Home Office. (1) Warrants of various kinds which are prepared at the Home Office for His Majesty's signature, and are countersigned and sealed by the Home Secretary. (2) Warrants which are prepared at the Crown Office, on instructions from the Secretary of State, for the passing of letters patent under the Great Seal. These warrants, which constitute the authority of the Lord Chancellor for the sealing of letters patent, are countersigned by the Secretary of State, but are not sealed by him. (3) Warrants under the royal sign manual for some special purpose in connection with the Royal Family, such as the royal consent to a marriage, and royal warrants conferring the title of Princess Royal or of Royal Highness. These are not countersigned by the Secretary of State, and are passed under the Great Seal in the same way as letters patent. The only seal which is in use in the Home Office is the second secretarial seal.

(*d*) In the event of the Secretary of State being himself *extra ecclesiam*, the duties are discharged by the First Lord of the Treasury (Parliamentary Debates, 3rd series, CCCXLIX., 1746).

(*e*) See titles ALIENS, Vol. I., p. 301; ANIMALS, Vol. I., p. 363; BUILDING SOCIETIES, Vol. III., p. 321; BURIAL AND CREMATION, Vol. III., p. 401; COMMONS, Vol. IV., p. 441; EXPLOSIVES; FACTORIES AND WORKSHOPS; INFANTS; INTOXICATING LIQUORS; LOCAL GOVERNMENT; MARKETS AND FAIRS; MASTER AND SERVANT; MINES, MINERALS, AND QUARRIES; PRISONS AND REFORMATORIES; PUBLIC HEALTH; THEATRES; and the index to the Statutory Rules and Orders, "Home Office."

(*f*) As to which, see pp. 102 *et seq.*, *post*. These boards never meet in practice.

(*g*) *Harrison* v. *Bush* (1855), 5 E. & B. 344, at p. 353.

(*h*) See p. 68, *ante*, and Vol. VI., pp. 345 *et seq.*, and title CRIMINAL LAW AND PROCEDURE.

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and may obtain the high prerogative writ *ne exeat regno* to keep a subject within the realm (*i*), and he is entitled to employ part of the sum placed at the disposal of the Secretaries of State as secret service money.

Powers of Home Secretary.

(2) The powers and duties of a Secretary of State under the Foreign Enlistment Act, 1870 (*k*), are intrusted to the Home Secretary; he admits foreigners to citizenship (*l*); grants certificates authorising proceedings against foreigners charged with offences under the Territorial Waters Jurisdiction Act, 1878 (*m*); indorses warrants to apprehend fugitive offenders under the Fugitive Offenders Act, 1881 (*n*); and receives requisitions from diplomatic representatives of foreign States for the extradition of fugitive criminals, and authorises the issue of warrants for their apprehension (*o*). He also has power to frame rules with respect to immigration boards, and appeals against the refusal of leave to land in this country (*p*); to make expulsion orders (*q*), and to authorise the payment of expenses incurred in deportation and in the maintenance of persons pending deportation (*r*).

Appointment of magistrates etc.

(3) In connection with the judicial administration, the Home Secretary advises the Crown on petitions by borough councils for a grant of a separate commission of the peace (*s*), or of a separate court of quarter sessions (*t*), and appoints stipendiary magistrates (*a*) and recorders (*b*), and also the metropolitan police magistrates (*c*), and the assistant judge of the Middlesex Sessions (*d*). He approves tables of fees framed by quarter sessions for clerks of the peace (*e*), and has power to order that clerks of the peace and clerks to petty sessions be paid by salary instead of by fees (*f*). He also has

(*i*) This is so stated by Anson, Law and Custom of the Constitution, 2nd ed., Vol. II., 233; 1 Bl. Com. 266. The writ was first employed as between subject and subject in the reign of James I. (see Lord Bacon's Ordinances, No. 89, where it is stated that the writ will be issued by the Lord Chancellor "upon prayer of any of the Principal Secretaries of State without cause showing or upon such information as his lordship shall think of weight"), and is now employed only in cases which come within the provisions of s. 6 of the Debtors Act, 1869 (32 & 33 Vict. c. 62) (*Drover* v. *Beyer* (1879), 13 Ch. D. 242, C. A.).

(*k*) 33 & 34 Vict. c. 90. See title CRIMINAL LAW AND PROCEDURE.

(*l*) Naturalization Act, 1870 (33 Vict. c. 14); see title ALIENS, Vol. I., p. 301.

(*m*) 41 & 42 Vict. c. 73.

(*n*) 44 & 45 Vict. c. 69.

(*o*) Extradition Act, 1870 (33 & 34 Vict. c. 52); and see title EXTRADITION AND FUGITIVE OFFENDERS.

(*p*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 2 (2).

(*q*) *Ibid.*, s. 3 (1).

(*r*) *Ibid.*, s. 4 (1); and see title ALIENS, Vol. I., 301.

(*s*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s, 156. See titles LOCAL GOVERNMENT; MAGISTRATES.

(*t*) *Ibid.*, s. 162.

(*a*) *Ibid.*, s. 161.

(*b*) *Ibid.*, s. 163.

(*c*) Metropolitan Police Acts, 1829—1895. See especially 10 Geo. 4, c. 44; 2 & 3 Vict. c. 47; Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), and 3 & 4 Vict. c. 71 (now repealed).

(*d*) Middlesex Sessions Act, 1844 (7 & 8 Vict. c. 71), s. 8.

(*e*) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43, s. 30); Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43, s. 3).

(*f*) Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 9.

power to make regulations as to the rates and scales of costs of prosecutors and of witnesses in criminal prosecutions (*g*).

(4) The general supervision of the police is intrusted to the Home Secretary, who advises the Crown as to the appointment of inspectors to inquire into the staff and efficiency of the police in every county and borough, and issues certificates for grants from the Treasury towards the expenses of maintaining such police (*h*). He has powers to take measures for the suppression of riots (*i*), and he may direct that special constables be sworn in, and that persons who are otherwise exempt from serving as special constables may be called upon to serve (*k*). Police.

(5) The general supervision of reformatory schools (*l*), of industrial schools (*m*), of criminal lunatics (*n*), and of prisons (*o*) falls within the department of the Home Secretary. Prisons etc.

147. The Home Secretary is not capable of suing or being sued in his official capacity (*p*). Legal proceedings.

Statutory powers conferred upon a Secretary of State in connection with the taking of proceedings are exercised by the Home Secretary in the following cases:—

(1) He may authorise persons to take proceedings in a county court for an order for the payment of expenses incurred in relation to the detention of a person in a State inebriate reformatory, where it is made to appear that such person has real or personal property more than sufficient to maintain his family (*q*). Inebriates.

(2) He may recover penalties in cases where undertakers enter upon the dwelling of any working man within the administrative county of London, contrary to the provisions of the Housing of the Working Classes Act, 1903 (*r*). Housing of working classes.

(3) Where an expulsion order is made in the case of an alien, he may pay the whole or any part of the expenses of or incidental to the departure from the United Kingdom and the maintenance until departure of such alien and his dependants (if any). If an expulsion order is made on a certificate given within six months after an alien has last entered the United Kingdom, the master of the ship in which he has been brought to the United Kingdom, and also the Expulsion of aliens.

(*g*) Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), s. 5. See title CRIMINAL LAW AND PROCEDURE.

(*h*) County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), ss. 15, 16. The control of the central authority over the police is principally derived from this Act, which does not apply to the metropolitan police district or to the City of London. The metropolitan police district is more directly under the control of the Home Secretary under the Metropolitan Police Acts, 1829 to 1895. See, generally, as to police, title POLICE.

(*i*) Under the Army Act, 1881 (44 & 45 Vict. c. 58).

(*k*) Special Constables Act, 1831 (1 & 2 Will. 4, c. 41), ss. 2, 3.

(*l*) Reformatory Schools Act, 1866 (29 & 30 Vict. c. 117).

(*m*) Industrial Schools Act, 1866 (29 & 30 Vict. c. 118).

(*n*) Criminal Lunatic Asylums Act, 1860 (23 & 24 Vict. c. 75).

(*o*) See especially the Prison Act, 1877 (40 & 41 Vict. c. 21), and title PRISONS.

(*p*) See generally pp. 65 *et seq.*, *ante*. For an action in tort against the Home Secretary personally in respect of acts done under a general order, see *Cobbett* v. *Grey* (1850), 4 Exch. 729.

(*q*) Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 12 (2) (a).

(*r*) 3 Edw. 7, c. 39, ss. 2 (1), 16, Sched. (9).

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master of any ship belonging to the same owner, are liable to pay to the Secretary of State, as a debt due to the Crown, any sums so paid by the Secretary of State in connection with the alien (*s*).

SUB-SECT. 3.—*The Foreign Office.*

Staff.

148. The Foreign Office is presided over by the Secretary of State for Foreign Affairs (*t*), assisted by a permanent and a parliamentary under-secretary (*a*).

Secretary of State for Foreign Affairs.

149. The Secretary of State for Foreign Affairs is primarily responsible to the Crown (*b*) and to Parliament (*c*) for formulating and conducting the foreign policy of the country. He conducts the correspondence with foreign Governments and with the British representatives in foreign countries, and the diplomatic and consular services (*d*) are subordinated to his department, private as well as public interests being equally within the scope of his activity. He has formal duties in connection with the reception of the representatives of foreign Governments and in presenting them to the Sovereign. He or the permanent under-secretary is usually present when matters of state are discussed between the Sovereign and a foreign minister, or a foreign Sovereign, or his representative (*e*).

Jurisdiction.

150. In addition to matters relating to countries which are not subject to the Crown, the relations between the Government and semi-independent States or protectorates which are not closely connected with any British colony, such as Egypt, fall within the department of the Foreign Office, as do also the relations of British colonies with foreign States.

SUB-SECT. 4.—*The Colonial Office.*

Staff.

151. The Colonial Office is presided over by the Secretary of State for the Colonies (*f*), assisted by a permanent and a parliamentary under-secretary (*g*). The degree of control exercised by

(*s*) Aliens Act, 1905 (5 Edw. 7, c. 13), s. 4; and see *A.-G.* v. *Sutcliffe*, [1907] 2 K. B. 997. And see title ALIENS, Vol. I., 103.

(*t*) As to his appointment and status generally, see p. 65, *ante*. He is not capable of suing or liable to be sued. *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*, [1901] A. C. 373, P. C., was a suit for compensation for lands taken under the special provisions of the Indian Land Acquisition Act, 1894, s. 6.

(*a*) For the staff of the office and the division of business, see the Foreign Office Guide.

(*b*) The relations of the Secretary of State with the Crown are particularly intimate owing to the direct influence exercised by the Sovereign upon the conduct of foreign affairs. See, as to the treaty-making power, Vol. VI., p. 427.

(*c*) Parliamentary control over the Secretary of State is less strict than in the case of other heads of executive departments, owing to the secrecy necessary to the conduct of foreign affairs. See Lowell, Government of England, Vol. I., 87; Todd, Parliamentary Government in England, ed. Walpole, Vol. I., 128.

(*d*) See Vol. VI., pp. 428 *et seq.*

(*e*) Stapylton, George Canning and His Times, 433, cited by Anson, Law and Custom of the Constitution, 3rd ed., Vol. II., 43.

(*f*) As to his appointment and status generally, see p. 65, *ante*.

(*g*) For the staff of the Colonial Office and the division of business, see the Colonial Office Guide.

the Colonial Office varies according to the form of government of the different colonies and dominions of the Crown (*h*).

SUB-SECT. 5.—*The India Office.*

Appointment of Secretary of State for India.

152. The Secretary of State for India is appointed by the Crown, on the advice of the Prime Minister, under the powers conferred upon the Crown by the Government of India Act, 1858 (*i*), by which the Government of the territories formerly in the possession of the East India Company were transferred to the Crown.

Status.

He is a member of the ministry and of the Cabinet, and is subject to the statutory disability common to all the Principal Secretaries of State, which debars him from sitting in the House of Commons if four other Principal Secretaries of State are members of that House (*k*).

Council of India.

153. The Secretary of State for India acts, as to matters relating to India and falling within the scope of his authority (*l*), with the advice of the Council of India, which consists of such number of members appointed by the Crown, and being not less than ten and not more than fourteen, as the Secretary of State may from time to time determine (*m*). The Secretary of State is president of the Council, with power to vote and to appoint a vice-president (*n*).

Under-secretaries.

154. The Secretary of State is assisted by a permanent and also by a parliamentary under-secretary.

Salaries.

155. The salaries enjoyed by the Secretary of State and his under-secretaries are directed to be the same as those paid to the other Principal Secretaries of State (*o*).

Transaction of business.

156. Subject to the provisions of the various Acts relating thereto, the Council of India, under the direction of the Secretary of State, is to conduct the business transacted in the United Kingdom relating to the Government of India (*p*); special provision is, however, made in cases rendering the signature of a Secretary of State

Signing of documents.

(*h*) See Vol. VI., pp. 421 *et seq.* And see, generally, title DEPENDENCIES AND COLONIES.

(*i*) 21 & 22 Vict. c. 106, s. 6, which provides that in case the Sovereign should be pleased to appoint a fifth Principal Secretary of State, there is to be paid to the latter and to his under-secretaries the same yearly salaries as are paid to the other Principal Secretaries of State. The salaries of the Secretaries of State are at present £5,000 per annum, and are placed on the estimates. The permanent secretaries receive salaries of £2,000, and the parliamentary secretaries £1,500, which also come upon the estimates.

(*k*) See p. 66, *ante*. This disability also applies to the under-secretaries of the Secretary of State (see *ibid.*).

(*l*) The powers are conferred by the Government of India Act, 1858 (21 & 22 Vict. c. 106), and various subsequent Acts relating to India. See, generally, title DEPENDENCIES AND COLONIES.

(*m*) Council of India Act, 1907 (7 Edw. 7, c. 35), s. 1. See also title DEPENDENCIES AND COLONIES.

(*n*) Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 21. As to suits by and against the Secretary of State for India in Council, see Robertson, Civil Proceedings by and against the Crown, pp. 25 *et seq.*

(*o*) See *ibid.*

(*p*) Government of India Act, 1858 (21 & 22 Vict. c. 106), s. 19.

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necessary to the validity of various documents issued by the India Office (*q*).

Permanent staff of the India Office.

157. The permanent staff of the India Office is composed of permanent members of the Civil Service holding office under the Crown during pleasure; and the Office itself is, for the purposes of transacting ordinary routine business, divided into a variety of departments (*r*).

SUB-SECT. 6.—*The Admiralty.*

Board of Admiralty.

158. The affairs of the Navy and of the Royal Marines (*s*) are administered by the Board of Admiralty, which consists of the Commissioners for the time being for executing the office of Lord High Admiral (*t*) of the United Kingdom (*u*), with the addition of a Permanent and of a Parliamentary and Financial Secretary.

The Commissioners are appointed by patent, and consist of the First Lord of the Admiralty, four naval or sea lords and a civil lord. The First Lord is a member of the Cabinet, and is responsible to the Crown and to Parliament for all the business of the Admiralty (*x*). The administrative business is distributed by the First Lord among the lords and the Parliamentary and Financial Secretary (*y*). The Admiralty establishment is divided into

(*q*) See Government of India Act, 1858 (21 & 22 Vict. c. 106), ss. 3, 19, and as to deeds, contracts, bonds, debentures, cheques, drafts, orders for money, or other documents formerly required to be signed in a particular manner, but which may now be signed by any two members of the Council and countersigned by the Secretary of State or his Under-Secretary or assistant Under-Secretary, see the India Stock Certificate Act, 1863 (26 & 27 Vict. c. 73), s. 16.

(*r*) See as to the permanent Civil Service, p. 80, *ante*. The departments at present existing are—Correspondence, Accountant-General's, Funds, Store, Registry and Record, Medical Board, Audit etc.

(*s*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 179.

(*t*) For the history of the office, see Stubbs, Constitutional History, Vol. II., 289; Select Pleas of the Admiralty (Selden Soc.), Vol. I., Introd.; Thring, Criminal Law of the Navy, 4. The Lord High Admiral is recognised in the statute 31 Hen. 8, c. 10. The office has been in commission since 1708, except for a short period in 1827, when it was thought necessary to declare that all powers and privileges granted to Commissioners and all duties imposed upon them should extend to the Lord High Admiral for the time being (Admiralty Act, 1827 (7 & 8 Geo. 4, c. 65), s. 1). For the statutory declaration of the power of Commissioners to exercise all the powers of the Lord High Admiral, see the Admiralty Act, 1690 (2 Will. & Mar. sess. 2, c. 2).

(*u*) For the style and title of the Commissioners, see the Interpretation Act, 1889 (24 & 25 Vict. c. 63), s. 12; Admiralty Act, 1832 (2 Will. 4, c. 40), ss. 1, 7; Admiralty Lands and Works Act, 1864 (27 & 28 Vict. c. 57), s. 2; Admiralty Powers, &c. Act, 1865 (28 & 29 Vict. c. 124), s. 2; Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78), s. 4.

(*x*) The patent appointing the Commissioners confers equal responsibility upon all the members. The sole responsibility of the First Lord was first officially laid down in an Order in Council of January 14th, 1869, and was recognised by the Commissioners appointed in 1888 to inquire into the civil and professional administration of the naval and military departments as being clearly established as regards ordinary matters of administration, although the evidence disclosed considerable differences of opinion as to the responsibility of naval lords as regards the consultative functions of the Commissioners upon questions of policy. See Report of the Commissioners, 1890, Parliamentary Paper, C. 5979, p. ix.

(*y*) *Ibid.*, p. viii.

departments (*a*), for the superintendence of one or more of which each naval lord, the Civil Lord, and the Parliamentary Secretary are severally responsible (*b*). The Permanent Secretary is responsible for the correspondence of the office, for the discipline of the civil establishments in London, and for maintaining a general continuity of administration on the advent of a new Board (*b*), which is also secured by the fact that while the offices of the First Lord, the Civil Lord, and the Parliamentary and Financial Secretary are political offices, the holders of which retire upon a change of Government, the naval lords do not necessarily retire in such case (*c*).

Powers and duties.

159. The powers and duties of the Commissioners may be exercised by any two or more of their number (*d*). They have power by agreement to purchase and take lands requisite for His Majesty's naval service, or for the use of any force or department in the employment or under the control of the Admiralty (*e*). They have also power under special Acts to purchase and take lands compulsorily (*f*), and for such a purpose the provisions of the Lands Clauses Acts (*g*) are incorporated (*h*). Lands vested in the Admiralty for the time being are held by the Lord High Admiral or the Commissioners for the time being, in succession, in trust for the Crown for the public service, according to the nature and tenure of such

(*a*) For the distribution of business among the various departments, see Report of the Commissioners, 1890, Parliamentary Paper, C. 5979, App. iii.

(*b*) *Ibid.*, p. ix.

(*c*) For the right of the Commissioners to sit in Parliament, see the Admiralty Act, 1832 (2 & 3 Will. 4, c. 40), s. 1.

(*d*) Two Commissioners are substituted for three as regards all acts which were before the passing of the Admiralty Act, 1832 (2 & 3 Will. 4, c. 40), required by any Act of Parliament to be done by three or more Commissioners (*ibid.*, s. 6). For their power to execute deeds, conveyances, leases, contracts and other instruments, see *ibid.*, s. 7, and as to commissions, warrants and orders, see the Admiralty Act, 1827 (7 & 8 Geo. 4, c. 65), s. 3.

(*e*) Admiralty Lands and Works Act, 1864 (27 & 28 Vict. c. 57), s. 3. For the purpose of such purchase and taking the Lands Clauses Acts are incorporated so far as they apply to the purchase or taking of lands by agreement (*ibid.*, s. 4).

(*f*) Such powers are contained in the Admiralty (Signal Stations) Act, 1815 (55 Geo. 3, c. 128), with respect to signal stations; Coastguard Service Act, 1856 (19 & 20 Vict. c. 83), s. 5; Defence Act Amendment Act, 1864 (27 & 28 Vict. c. 89); and Naval Works Act, 1895 (58 & 59 Vict. c. 35). Powers under a special Act are not to be exercised after the expiration of five years from the passing of such Act (Admiralty Lands and Works Act, 1864 (27 & 28 Vict. c. 57), s. 8); and see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 1.

(*g*) For the statutes included by these words, see the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 23.

(*h*) Admiralty Lands and Works Act, 1864 (27 & 28 Vict. c. 57), s. 5. The Admiralty are expressly exempted from the necessity of giving bonds (s. 21) and from liability to penalties (ss. 24, 25). The Commissioners may withdraw a notice of intention to take lands compulsorily within two months after the giving of such notice (*ibid.*, s. 6), but nothing done under this section is to prejudice any claim of any owner or person interested in such lands for compensation or damage occasioned by the giving of such notice (*ibid.*). For the provisions of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), and the Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33), which are to be incorporated in special Acts, see Admiralty Lands and Works Act, 1864 (27 & 28 Vict. c. 57), s. 7, and for the provisions of those Acts as to works, and as to the temporary occupation of land, *ibid.*, s. 20.

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lands and the estate, term or interest acquired by the Admiralty therein (*i*). The Admiralty has all such powers of management and leasing and all such other powers and rights as would be had in relation thereto by any individual holding the same for such estate, term or interest as the Admiralty have therein (*k*).

Judicial powers.

160. The Commissioners may administer oaths and act as justices, and all statutes made or to be made for the protection of justices of the peace in the execution of their office extend to the Commissioners and to all constables and other peace officers acting under any warrant or authority from them (*l*).

Dockyards and harbours.

161. The Admiralty has power to appoint harbour-masters, under the title of King's Harbour-master, to superintend the execution of the rules regulating the use of dockyard ports (*m*). The Admiralty may retain control over the whole or part of any harbour, port, bay, estuary, or navigable river, in or adjoining to which there is a dockyard, victualling yard, steam factory yard, arsenal, or naval station, where such retention is deemed necessary in the interests of the naval service (*n*).

Greenwich Hospital.

162. The government of Greenwich Hospital and of its schools and the lands belonging to the hospital is vested in the Admiralty (*o*). The Commissioners may permit the temporary use of the hospital for the purpose of the naval service or of any

(*i*) Admiralty Lands and Works Act, 1864 (27 & 28 Vict. c. 57), s. 9. For the provisions with regard to the sale of superfluous lands, see *ibid.*, ss. 14—19.

(*k*) *Ibid.*, s. 10. Admiralty Powers, &c. Act, 1865 (28 & 29 Vict. c. 124), s. 1.

(*l*) Admiralty Act, 1832 (2 Will. 4, c. 40), s. 5. The Admiralty Powers, &c. Act, 1865 (28 & 29 Vict. c. 124), s. 5, provides that superintendents of royal dockyards shall be justices of the peace in respect of offences specified in the Act and all matters relating to the naval service, and the stores, provisions, and accounts thereof.

(*m*) Dockyard Ports Regulation Act, 1865 (28 & 29 Vict. c. 125), s. 4.

(*n*) Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69), s. 9. The Act transferred to the Board of Trade powers formerly exercised by the Admiralty under the Preliminary Inquiries Act, 1851 (14 & 15 Vict. c. 49); Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27); Railways Clauses Consolidation Acts, 1845 (8 & 9 Vict. cc. 20, 33); Tramways (Ireland) Act, 1860 (23 & 24 Vict. c. 152), s. 41; General Pier and Harbour Act, 1861, Amendment Act, 1862 (25 & 26 Vict. c. 19), as well as the powers as to public harbours contained in the Public Harbours Act, 1806 (46 Geo. 3, c. 153), and as to ballast contained in the Harbours Act, 1814 (54 Geo. 3, c. 159). Holyhead and Portpatrick harbours are vested in the Board of Trade by the Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69), s. 17; and the Thames and the Mersey are expressly excepted from the transfer to the Admiralty effected by the Act (*ibid.*, s. 10). The Admiralty has the same power as that possessed by the Secretary of State for War under the Military Lands Act, 1892 (55 & 56 Vict. c. 43), ss. 14—18, to make bye-laws governing the use of lands (including the bed of the sea or tidal waters) appropriated for any purpose of the royal navy (Military Lands Act, 1900 (63 & 64 Vict. c. 56)). As to colonial docks, see Colonial Docks Loans Act, 1865 (28 & 29 Vict. c. 106).

(*o*) Greenwich Hospital Act, 1865 (28 & 29 Vict. c. 89). The Admiralty has the right, after the lapse of six and a half years, to pay or credit the residue or any part thereof of the estate or effects of a deceased officer, seaman, or marine, which have been received by the Admiralty, to the account of the Hospital (Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 30).

department of His Majesty's Government or for the benefit of persons engaged in seafaring pursuits (*p*).

The Admiralty has the exclusive right to publish the Nautical Almanack (*q*).

With regard to the construction of tramways, the Admiralty has the same right to obtain provisional orders (*r*) as the Secretary of State for War (*s*).

Wireless telegraphy.

The Admiralty has power to take proceedings against any person who establishes a wireless telegraph station or instals or works any apparatus for wireless telegraphy in any place or on board any British ship without a licence from the Postmaster-General (*t*).

Legal proceedings.

163. The Admiralty has power to institute actions, suits, or proceedings generally in respect of matters relating to their rights, powers, or duties, or in respect of property vested in them or under their control, in like manner (as nearly as may be) as if the question in dispute were one between subject and subject (*a*). Such proceedings are not affected by any change in the individuals who hold the office of commissioners (*b*). The Crown may, nevertheless, if so advised, proceed by information (*c*). The Admiralty are liable to pay and entitled to receive costs according to the ordinary law and practice (*d*). Thus, the Admiralty may recover damages in an action against shipowners for negligent management of a ship containing Admiralty stores (*e*); they may take proceedings in the Admiralty Court against a vessel for damages for collision (*f*), and may enter a claim against a fund paid into the Admiralty Court in a suit for limitation of liability (*g*).

The Admiralty may bring any action or suit in relation to lands vested in or purchased by the Commissioners (*h*), or to lands contracted to be purchased or taken by them (*i*) under statutory powers, and may bring any action of ejectment, or other action or suit for recovering possession of lands, and may distrain and sue for arrears of rent (*k*). They may bring any action or suit in respect of trespass or encroachment upon such lands (*l*).

(*p*) Greenwich Hospital Act, 1869 (32 & 33 Vict. c. 44), s. 7.
(*q*) Nautical Almanack Act, 1828 (9 Geo. 4, c. 66).
(*r*) Naval Works Act, 1899 (62 & 63 Vict. c. 42), s. 2.
(*s*) Military Tramways Act, 1887 (50 & 51 Vict. c. 65).
(*t*) Wireless Telegraphy Act, 1904 (4 Edw. 7, c. 24), s. 1.
(*a*) Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78), s. 3. The section deals principally with actions relating to naval stores, but its terms are wide enough to include almost every cause of action.
(*b*) Admiralty Lands and Works Act, 1864 (27 & 28 Vict. c. 57), s. 11; Admiralty Powers, &c. Act, 1865 (28 & 29 Vict. c. 124), s. 2; Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78), s. 4.
(*c*) *Ibid.*, s. 7. The prerogatives of the Crown are expressly preserved by s. 6.
(*d*) *Ibid.*, s. 5.
(*e*) *Admiralty Commissioners* v. *McGregor, Gow & Co.* (1885), 1 T. L. R. 679, C. A.
(*f*) *The Etna* (1907), 24 T. L. R. 270.
(*g*) *The Zoe* (1886), 11 P. D. 72; *The St. Paul*, [1908] P. 320.
(*h*) Admiralty Powers, &c. Act, 1865 (28 & 29 Vict. c. 124), s. 1.
(*i*) Admiralty Lands and Works Act, 1864 (27 & 28 Vict. c. 57), s. 11.
(*k*) For the special provisions with regard to recovery of possession of lands, see Admiralty Lands and Works Act, 1864 (27 & 28 Vict. c. 57), ss. 12, 13.
(*l*) *Ibid.*, s. 11.

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164. The Admiralty are not liable to be sued except with respect to lands; the remedy in other cases (if any) is by petition of right (*m*). In suits relating to lands the Admiralty may defend (*n*) any action or suit, and are liable to pay and entitled to receive costs according to the ordinary law and practice (*o*).

SUB-SECT. 7.—*The War Office.*

War Office.

165. The present interior organisation of the War Office dates from the year 1904, when the system of dual control exercised since 1855 (*p*), with regard to military administration, by the Secretary of State for War (*q*), and the Commander-in-Chief, gave place to the present distribution of administrative duties between the Secretary

(*m*) As in *Churchward* v. *R.* (1865), L. R. 1 Q. B. 173 (petition of right for breach of contract in respect of carriage of mails); *Stewards & Co.* v. *R.* (1900), 16 T. L. R. 153, 17 T. L. R. 111, C. A., and *sub nom. A.-G.* v. *Stewards & Co.* (1901), 18 T. L. R. 131, H. L. (breach of contract in regard to the supply of stores); and *Yeoman* v. *R.*, [1904] 2 K. B. 429, C. A. (demurrage). As regards liability for torts, see Vol. VI., p. 415, and *Raleigh* v. *Goschen*, [1898] 1 Ch. 73.

(*n*) Admiralty Lands and Works Act, 1864 (27 & 28 Vict. c. 57), s. 11; Admiralty Powers, &c. Act, 1865 (28 & 29 Vict. c. 124), s. 1; and see, as to Greenwich Hospital, the Greenwich Hospital Act, 1865 (28 & 29 Vict. c. 89), ss. 52, 53, 54. It has been thought that the above provisions do not give an absolute right to sue the Admiralty; see Robertson, Civil Proceedings by and against the Crown, 32, 39, and the unreported cases there cited.

(*o*) Admiralty Powers, &c. Act, 1865 (28 & 29 Vict. c. 124), s. 2. In *Williams* v. *Admiralty Commissioners* (1851), 11 C. B. 420, decided upon similar provisions in the now repealed statute 1 & 2 Geo. 4, c. 93, it was suggested that in an action against the Commissioners in their official capacity a copy of the writ should be served upon each of them. In practice, no doubt, the Treasury Solicitor would accept service. See Robertson, Civil Proceedings by and against the Crown, 40. For the powers and duties of the Admiralty as regards naval matters generally, see title ROYAL FORCES.

(*p*) Before 1855 the control of military matters was divided between a variety of departments, and the consequent inefficiency revealed by the Crimean war led to centralisation of the various duties in the War Office under the dual control of the Secretary of State and the Commander-in-Chief (see Report of the War Office (Reconstitution) Committee, Part I., p. 8, Parliamentary Paper, 1904, Cd. 1932, Vol. VIII.). Various reorganisations have since taken place with a view to obtaining efficient military administration, and, owing to the defects disclosed by the South African war, the various duties were distributed between eight officials under the direct control or general supervision of the Commander-in-Chief, the Secretary of State remaining responsible for the whole (see Order in Council, 4th November, 1901). The subsequent developments are also due to the defects revealed by the South African war, and the report of Lord Esher's (War Office (Reconstitution)) Committee in 1904 (see note (*r*), p. 93, *post*).

(*q*) Between 1794 and 1854 the duties relating to war were shared by the Secretary of State for War and the Colonies (whose office was created in 1794) and the Home Secretary, the office of Secretary at War (created in the reign of Charles II.) existing side by side with these (see Clode, Military Forces of the Crown, Vol. I., p. 71; Vol. II., pp. 320, 769). At the time of the Crimean war, in 1855, an additional Secretary of State for the War Department was created whose office was combined with that of the Secretary at War, and the Colonial Secretary was relieved of his war duties (see the official memorandum stating the details of War Office organisation between 1854 and 1869 given in Clode's Military Forces of the Crown, Vol. II., pp. 769, 770). As to the history of the War Office generally, see *ibid.* The office of Secretary at War was finally abolished in 1863, his duties becoming amalgamated with those of the Secretary of State for War (Secretary at War Abolition Act, 1863 (26 & 27 Vict. c. 12)).

of State for War and the other members of the Army Council, whilst the executive duties of inspection formerly exercised by the Commander-in-Chief, in addition to his administrative duties at the War Office, were decentralised or separated entirely from the administrative duties now exercised by the Army Council (*r*), and were handed over to the Inspector-General of the Forces, assisted by seven subordinate inspectors for the different branches of the service (*s*).

Army Council.

166. The composition of the Army Council, and the interior organisation of the War Office, so far as they admit of definite analysis, and subject to changes which are or may be made from time to time, appear to be as follows:—

The Army Council is composed of seven members (*t*), namely, the Secretary of State for War (President of the Council); first military member (Chief of the General Staff); second military member (Adjutant-General to the Forces); third military member (Quartermaster-General to the Forces); fourth military member (Master-General of the Ordnance); civil member (Parliamentary Under-Secretary of State); finance member (Financial Secretary).

The former secretary of the War Office now acts as the permanent Under-Secretary of State to the Army Council (*u*).

The War Office itself is divided into various departments, corresponding to the offices of the various members of the Army Council, together with a department appropriated to the Inspector-General of the Forces, each department having a separate permanent staff (*a*).

Duties of council.

167. The general duties of the Army Council are to administer matters pertaining to the military forces and the defence of His

(*r*) This result, together with the establishment of the Army Council, was due to the recommendations of the War Office (Reconstitution) Committee held under the presidency of Lord Esher in 1904, which attributed the previous failures to five principal causes: (1) the want of a special body in the War Office to consider questions of policy only as opposed to routine; (2) the divorce of real power (vested in the Commander-in-Chief) from responsibility (vested in the Secretary of State); (3) the centralisation of administrative duties with the executive command in the Commander-in-Chief; (4) the over-burden of duties devolving upon the Commander-in-Chief; (5) the non-existence of a permanent nucleus to the defence committee of the Cabinet (see Report of the War Office (Reconstitution) Committee, 1904, Part I., Parliamentary Paper, 1904, Cd. 1932, Vol. VIII.).

(*s*) Namely, of Cavalry, Royal Horse and Royal Field Artillery, Royal Garrison Artillery, Royal Engineers, Army Service Corps, Medical Services, Equipment and Ordnance Stores.

(*t*) Letters Patent, 6th February, 1904 (see the *London Gazette*, 12th February, 1904, and, as to the style of members of the Council, supplement to the *Gazette* of the same date), by which the office of Commander-in-Chief was abolished and the present Army Council constituted.

(*u*) See Report of the War Office (Reconstitution) Committee, Part II., p. 7, Parliamentary Paper, 1904, Cd. 1932, Vol. VIII.).

(*a*) The present interior arrangement of the War Office, which is intended to be assimilated to that of the Admiralty, is due to the report of Lord Esher's Committee in 1904. The arrangement and duties of the various departments (so far as adopted) is detailed in Part I., p. 7, of the Report (see Parliamentary Paper, 1904, Cd. 1932, Vol. VIII.).

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Majesty's dominions, with such power and authority as were formerly exercised under the royal prerogative by the Secretary of State, the Commander-in-Chief, and other officers acting under the Secretary of State. The Council has also full power and authority to appoint such officers as they think fit for the conduct of the business of the civil departments of the military service, and to make contracts, and do all other things which may seem necessary in their discretion (*b*).

The signature of the Council is to be affixed by any two of its members, or by any one of them with the secretary appointed by the Council (*c*).

The responsibility, both to the Crown and Parliament, of all the business of the Army Council is borne by the Secretary of State (*d*).

Organisation of Army Council.

168. The Secretary of State may specially reserve to himself any business which he pleases. But all other business is (according to the rules originally formulated, but which are liable to alteration) to be transacted in the following principal divisions: —(1) The four military members of the Council are responsible to the Secretary of State for the administration of so much of the business relating to the organisation, disposition, *personnel*, armament, and maintenance of the army as may be assigned to them by the Secretary of State. (2) The finance member (financial secretary) of the Council is responsible to the Secretary of State for the finance of the army, and such other business of the Council as may be assigned to him by the Secretary of State. (3) The civil member is responsible to the Secretary of State for the non-effective votes, and such other business of the Council as the Secretary of State may assign to him. (4) The former secretary of the War Office is to act as secretary of the Army Council, and is charged with the interior economy of the War Office, the preparation of all official communications of the Council, and such other duties as the Secretary of State may assign to him (*e*). (5) The Director of Army Finance (now the assistant financial secretary) acts as deputy and assistant to the finance member of the Council, and as the accounting officer of army votes, accounts, and funds, and is charged with the allowance and payment of all moneys for army services. He also accounts for and audits all cash expenditure, and prepares the annual accounts for such expenditure for Parliament, audits all manufacturing expenses and supply and store accounts, and advises the administrative officers at the War Office, and in commands, on all questions of army expenditure (*f*).

Inspector-General.

169. The duties of the Inspector-General of the Forces are to review and report to the Army Council upon the practical results of

(*b*) Letters Patent, 6th February, 1904 (*London Gazette*, February 12th, 1904).
(*c*) *Ibid.*
(*d*) Order in Council, 10th August, 1904 (*London Gazette*, 16th August, 1904).
(*e*) *Ibid.*
(*f*) *Ibid.* The office of Director of Army Finance has recently been reconstituted, and an assistant financial secretary appointed in his place. See the *Times*, 29th July, 1908, p. 11.

their policy, and for that purpose to inspect and report upon the training and efficiency of all troops under the control of the home Government, on the suitability of their armament and equipment, on the condition of fortifications and defences, and generally on the readiness and fitness of the army for war (*g*). It is not intended that the Inspector-General should have any voice in the determination of policy (*h*).

Transferred powers.

170. The duties of the former Agent-General for volunteers and local militia have been transferred to and are now exercisable (so far as they remain unaffected by statute) partly by the Secretary of State for War and partly by the Paymaster-General (*i*); and the duties, powers, authorities, rights, and privileges formerly exercised by the Secretary at War (*k*) and his deputy, have been vested in the Secretary of State for War (subject to a like qualification), and are now exercisable by the latter and the Under-Secretary of State for War respectively (*l*).

Powers of Ordnance officers.

171. All the powers, authorities, rights, and privileges whatsoever which were before the 14th August, 1855, or at any time vested in or exercisable by the principal officers of Her late Majesty's Ordnance, or any of them, under the Defence Acts, 1842 and 1855, or any other Act of Parliament, law, custom, or usage whatsoever, have been, as from the 14th August, 1855, transferred to, vested in, and made exercisable by the Secretary of State for War, who is entitled to the same exemption from personal responsibility as that to which the principal officers of the Ordnance were entitled (*m*).

172. Whether the Secretary of State for War can sue or be sued apart from statutory provisions appears to be doubtful (*n*);

(*g*) Order in Council, 10th August, 1904 (*London Gazette*, 16th August, 1904).

(*h*) See Report of the War Office (Reconstitution) Committee, 1904, Part I., pp. 10, 13 (Parliamentary Paper, 1904, Cd. 1932, Vol. VIII.). As to the military forces of the Crown generally, see title ROYAL FORCES.

(*i*) Paymaster General Act, 1817 (57 Geo. 3, c. 41), s. 2; Secretary at War Abolition Act, 1863 (26 & 27 Vict. c. 12), s. 1. The transfer is made subject to such rules and regulations as may be made from time to time by the Secretary of State for War and the Paymaster General (*ibid.*).

(*k*) As to the Secretary at War, see note (*q*), p. 92, *ante*.

(*l*) Secretary at War Abolition Act, 1863 (26 & 27 Vict. c. 12), s. 1.

(*m*) Ordnance Board Transfer Act, 1855 (18 & 19 Vict. c. 117), s. 1. By s. 2, all lands, estates and property whatsoever formerly vested in the Board of Ordnance on behalf of the Crown, or used, occupied, vested or taken by or in the name of or by any persons in trust for the Crown for the use and service of the War Department, were transferred to and vested in the Secretary of State for War and his successors, as to fee simple estates of inheritance, as a corporation sole, and as to all lands and property of a less estate, as if originally conveyed or otherwise assured to the said Secretary of State as a corporation sole. But all hereditaments of copyhold or customary tenure for the purpose mentioned in s. 8 of the Defence Act, 1842 (5 & 6 Vict. c. 94), were directed to remain vested in, or to be surrendered to some person approved of or named by the Secretary of State for War, as tenant thereof. As to the substitution of the Secretary of State for War for the Board of Ordnance in all contracts and proceedings, see the Ordnance Board Transfer Act, 1855 (18 & 19 Vict. c. 12), ss. 3, 4.

(*n*) See *Kirk* v. *R.*, *A.-G.* v. *Kirk* (1872), L. R. 14 Eq. 558, *per* WICKENS, V.-C.: "In this court the Secretary of War has sued and been sued. There may have been more or less consent, but he has been sued and has sued like

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Actions by and against Secretary of State for War.

express provisions for suits by him have, however, been made in the following cases:—The Secretary of State for War (*o*) and his successor for the time being may prosecute and maintain actions of ejectment, or other proceedings at law or in equity for recovering possession of any messuages, buildings, castles, lines, or other fortifications, manors, lands, or hereditaments vested in him under the Defence Act, 1842 (*p*), or otherwise howsoever, and may distrain or sue for any arrears of rent in respect of the same under any parol or other demise from the said Secretary of State (or the former principal officers of Ordnance). He may also prosecute and maintain any other action or suit in respect of or in relation to the above messuages, buildings etc., or in respect of any trespass or encroachment committed thereon, or damage or injury done thereto; also upon all covenants and contracts whatsoever made with the Secretary of State (or the former principal officers of Ordnance) relating to the Ordnance or Barrack Department (as mentioned in the Act) or the defence of the realm; and may also prosecute or defend any other action, suit, or legal proceeding, civil or criminal, concerning the goods or chattels, stores, moneys, and other property, under the care, control, and disposition of the Secretary of State for War. In all such actions, or other proceedings, the Secretary of State is to be called "His Majesty's Principal Secretary of State for War" without naming him, and no such action or other proceeding is to abate by the death, resignation, or removal of the Secretary of State for War (*q*).

These provisions are not to defeat or abridge the legal rights and privileges and prerogatives of the Crown in any such action, suit, or other proceeding brought or instituted in the name and on behalf of the Secretary of State for War; and in all matters relating thereto the same rights, privileges, and prerogatives claimed and enjoyed by the Crown in any court of law or equity may be claimed, exercised, and enjoyed by the Secretary of State for War

any other suitor." See *contra*, Robertson, Civil Proceedings by and against the Crown, p. 3.

(*o*) Principal officers of the Ordnance in the Act, now the Secretary of State for War (Ordnance Board Transfer Act, 1855 (18 & 19 Vict. c. 117), ss. 1, 3, 4; see note (*m*), p. 95, *ante*).

(*p*) 5 & 6 Vict. c. 94.

(*q*) Defence Act, 1842 (5 & 6 Vict. c. 94), s. 34, amended, as to the substitution of the Secretary of State for War in place of the principal officers of Ordnance, by the Ordnance Board Transfer Act, 1855 (18 & 19 Vict. c. 117), ss. 3, 4. It has been thought that these provisions do not give an absolute right to sue the Secretary of State; see Robertson, Civil Proceedings by and against the Crown, 32, and the cases there cited. By s. 5 of the latter Act, in all contracts or assurances unto or by the Secretary of State for War, and in every other deed or instrument relating to lands, hereditaments, estates, or property, or in anywise to the public service where he is or is intended to be a party, the Secretary of State for War may be styled "His Majesty's Principal Secretary of State for the War Department" without naming him, and all such contracts and instruments may be executed by him or any other Principal Secretary of State by signing his name, or in the case of a deed by setting or affixing a seal thereto, and delivering the same as his deed. Deeds or other instruments so executed by any other Secretary of State than the Secretary of State for War are for the purposes of the same to be taken as executed by the Secretary of State for War.

in the same manner as if the subject-matter of the suit or other proceeding were vested in the Crown, and as if the Crown were actually a party thereto (*r*).

Suits concerning military or ordnance stores.

173. The Secretary of State for War may also institute and prosecute any action, suit, or proceeding, civil or criminal, concerning military or ordnance stores, or other His Majesty's stores under his charge or control, or any stores sold or contracted to be delivered to or by him for the use or on account of His Majesty, or the price to be paid for the same, or any loss of or injury to any such stores as aforesaid, and may (*s*) defend any action, suit, or proceeding concerning any such stores, matter, or thing as aforesaid (*t*).

The above powers are subject to similar provisions as to the description of the Secretary of State in suits, and as to abatement on a change of the holder of the office, and as to the savings of other legal rights and remedies of the Crown, as in the case of the Defence Act, 1842 (*u*), and His Majesty may, when it seems fit, proceed by information on the Revenue side of the King's Bench Division, or by any other Crown process, legal or equitable, as if the above provisions had not been enacted (*x*).

Any notice, summons, writ or other document required to be served on the Secretary of State may be delivered to the solicitor for the War Department for the time being, or left for him at the War Office; and any notice, summons, writ, or other document required to be given by or on behalf of the Secretary of State for War may be given under the hand of the said solicitor (*y*).

174. The Secretary of State is expressly exempted from liability to any fine, penalty, or forfeiture, or to the execution of any process against his person or property, by reason of anything done or

(*r*) Defence Act, 1842 (5 & 6 Vict. c. 94), s. 34. The Crown may proceed by information or by any other Crown process, legal or equitable, in any case in which the actions, suits, arbitrations, or other proceedings mentioned in the Defence Act, 1842 (5 & 6 Vict. c. 94), might have been otherwise instituted (*ibid.*).

(*s*) Held in an unreported case in chambers, that "may," coupled with the provisoes below, means that the Secretary of State can only be sued with his own consent: Robertson, Civil Proceedings by and against the Crown, p. 32; but see *contra*, *Williams* v. *Admiralty Commissioners* (1851), 11 C. B. 420.

(*t*) War Department Stores Act, 1867 (30 & 31 Vict. c. 128), s. 20. For cases under the section see *Secretary of State for War* v. *Studdert*, [1901] 1 I. R. 346, C. A. (action for damages for fraudulent breach of duty etc. in connection with the purchase of horses); *Secretary of State for War* v. *Wynne*, [1905] 2 K. B. 845 (damages for illegally distraining an army horse). See also for an instance of process by English information (supply and carriage of horses), Robertson, *supra*, p. 32.

(*u*) War Department Stores Act, 1867 (30 & 31 Vict. c. 128), s. 20. As to the provisions of the Defence Act, 1842 (5 & 6 Vict. c. 94), see *supra*.

(*x*) War Department Stores Act, 1867 (30 & 31 Vict. c. 128), s. 20.

(*y*) Defence Act, 1860 (23 & 24 Vict. c. 112), s. 45. This provision is general in terms, but, probably, it applies only to notices etc. under the Act, since by s. 46 it is expressly extended (together with the other provisions of the Act relating to notices) to notices to owners, lessees and occupiers, and notices, writs, or other documents to the Secretary of State for War, where lands are surveyed and marked out under the Defence Act, 1842 (5 & 6 Vict. c. 94), as amended by subsequent Acts (*ibid.*, s. 46).

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omitted to be done under the Defence Act, 1860 (*z*); and nothing in the Defence Act, 1842, or contained in any instrument authorised by the Act, is to extend to charge the Secretary of State or his representatives, or his or their lands or goods, nor is the Secretary of State personally, or his property, liable to any legal process or execution in actions, suits, arbitrations, or other proceedings under the Act (*a*).

SUB-SECT. 8.—*The Imperial Defence Committee.*

Functions and constitution.

175. The Committee for Imperial Defence is a committee entirely without executive authority, its duties being merely advisory and consultative. Its function is to advise the Government and the various departments concerned with questions of defence upon general questions of policy. It does not interfere with administration. Thus, the Committee does not deal with the details of estimates, which remain in the hands of the ministers in charge of departments and of the Chancellor of the Exchequer (*b*).

The Committee consists of the Prime Minister, the Secretary of State for War, the First Lord of the Admiralty, the heads of the Army General Staff and the Army Intelligence Department, the First Sea Lord of the Admiralty and the heads of the Naval Intelligence Department (*c*). To these are added from time to time any persons who may be peculiarly qualified to assist the Committee in dealing with any particular or local question (*d*).

The Committee is assisted by a permanent staff, including a secretary, who keeps a record of the proceedings (*e*).

SUB-SECT. 9.—*The Secretary for Scotland.*

Status.

176. Scottish affairs are principally administered by the Secretary for Scotland (*f*). He is capable of sitting and voting in the House of Commons (*g*), and is a Privy Councillor, but not a Secretary of State, and he is generally a member of the Cabinet. If the Secretary is a peer, the Lord Advocate represents Scotland in the House of Commons (*h*).

The Secretary may appoint such permanent secretaries, inspectors, clerks, and other officers as he may, with the sanction of the Treasury, determine (*i*).

(*z*) 23 & 24 Vict. c. 112, s. 43.

(*a*) Defence Act, 1842 (5 & 6 Vict. c. 94), s. 37, as amended by the Ordnance Board Transfer Act, 1855 (18 & 19 Vict. c. 117). See also Vol. VI., p. 413, as to the personal liability of officers of the Crown in suits and actions.

(*b*) Parliamentary Debates, 4th Series, Vol. CXVIII., 291.

(*c*) *Ibid.*, Vol. CXXXIX., 619 *et al.*

(*d*) *Ibid.*

(*e*) *Ibid.* See also title ROYAL FORCES.

(*f*) For title and constitution, see Secretary for Scotland Act, 1885 (48 & 49 Vict. c. 61), s. 2. The rights of the Lord Advocate are preserved by a saving clause (s. 9).

(*g*) *Ibid.*, s. 3. There is no parliamentary under-secretary for Scotland. Before the creation of the office of Secretary for Scotland Scottish affairs were principally in the hands of the Home Secretary, the Lord Advocate acting as parliamentary under-secretary in addition to the assistance which he gave generally.

(*h*) Anson, Law and Custom of the Constitution, Vol. II., ii. (i.), 209.

(*i*) Secretary for Scotland Act, 1885 (48 & 49 Vict. c. 61), s. 2.

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Authentication of orders.

Rules, regulations, and orders made by the Secretary for Scotland are valid if made under the official seal, and signed by him, or by any other officer appointed by him for that purpose. Production of a copy of such rule, order, or regulation, purporting to be certified as a true copy by any secretary or officer appointed by the Secretary for Scotland for that purpose, is sufficient primary evidence that such rule, order, or regulation was properly made (*k*).

Powers and duties.

177. The powers and duties vested in the Secretary for Scotland are—

(1) All powers and duties vested in or imposed on one of His Majesty's principal Secretaries of State by any Act of Parliament, law, or custom, so far as such powers and duties relate to Scotland (*l*);

(2) (*m*) All powers and duties vested in or imposed on the Treasury under the Lands Valuation (Scotland) Act, 1854 (*n*);

(3) (*o*) All powers and duties vested in or imposed on the Board of Trade relating to provisional orders dealing with any subjects transferred to the Fishery Board for Scotland by the Sea Fisheries (Scotland) Amendment Act, 1885 (*p*);

(4) The duties of Vice-President of the Scottish Education Department (*q*);

(5) The duties of Keeper of the Great Seal appointed (*r*) to be kept and made use of in Scotland in place of the Great Seal of Scotland (*s*).

SUB-SECT. 10.—*The Irish Office.*

The Lord Lieutenant of Ireland.

178. Ireland is in theory governed by the Lord Lieutenant (*t*), assisted by a separate council, the medium of communication

(*k*) Secretary for Scotland Act, 1885 (48 & 49 Vict. c. 61), s. 4.

(*l*) Secretary for Scotland Act, 1887 (50 & 51 Vict. c. 52, in part repealed by the Stat. Law Rev. Act, 1908 (8 Edw. 7, c. 49)), s. 2 (1), except (1) the powers and duties of a Secretary of State under the following statutes or any Acts amending the same: Factory and Workshop Act, 1901 (1 Edw. 7, c. 22); Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76); Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77); Explosives Act, 1875 (38 & 39 Vict. c. 17); Cruelty to Animals Act, 1876 (39 & 40 Vict. c. 77); and Reformatory and Industrial Schools Acts, 1866 to 1879 (see Secretary for Scotland Act, 1887 (50 & 51 Vict. c. 52, in part repealed by the Stat. Law Rev. Act, 1908 (8 Edw. 7, c. 49), s. 3); (2) the powers, duties, or functions of a principal Secretary of State as Secretary of State for the War Department (Secretary for Scotland Act, 1889 (52 & 53 Vict. c. 16), s. 1). Powers and duties of a Secretary of State, of the Privy Council, of the Treasury, and of the Local Government Board under various statutes were conferred by the Secretary for Scotland Act, 1885 (48 & 49 Vict. c. 61), s. 5.

(*m*) Secretary for Scotland Act, 1887 (50 & 51 Vict. c. 52, in part repealed by the Stat. Law Rev. Act, 1908 (8 Edw. 7, c. 49)), s. 2 (1), (3).

(*n*) 17 & 18 Vict. c. 91.

(*o*) Secretary for Scotland Act, 1887 (50 & 51 Vict. c. 52, in part repealed by the Stat. Law Rev. Act, 1908 (8 Edw. 7, c. 49)), s. 2 (3).

(*p*) 48 & 49 Vict. c. 70.

(*q*) Secretary for Scotland Act, 1885 (48 & 49 Vict. c. 61), s. 6.

(*r*) By the Union with Scotland Act, 1706 (6 Ann. c. 11; 5 Ann. c. 8, Ruff.), art. 24.

(*s*) Secretary for Scotland Act, 1885 (48 & 49 Vict. c. 61), s. 8.

(*t*) The Lord Lieutenant is the direct representative of the Crown. His official acts are considered acts of State, for which he cannot be held personally liable

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between the Lord Lieutenant and the Crown being the Home Office (*u*). In practice the administration is in the hands of the Chief Secretary to the Lord Lieutenant (*v*), presiding over the Irish Office, and representing the Government, as the minister charged with the care of Irish affairs in the House of Commons. Either the Lord Lieutenant or the Chief Secretary is included in the Cabinet.

The Chief Secretary.

SUB-SECT. 11.—*The Treasury Board and the Exchequer.*

The Treasury.

179. The expression "the Treasury" means the Lord High Treasurer for the time being, or the Commissioners for the time being, of His Majesty's Treasury (*w*). The offices of Lord High Treasurer of Great Britain and of Lord High Treasurer of Ireland are united in one office (*x*), the holder of which has the same powers over the revenue in Scotland (*y*) and in Ireland (*a*) as in England.

Treasury Commissioners.

180. The office of Lord High Treasurer is executed by commissioners, the power to appoint commissioners by patent under the Great Seal being expressly recognised by statute (*b*). The Commissioners are capable of sitting and voting in the House of Commons (*c*).

in the Irish courts; so that his position differs from that of the ordinary colonial governor, who can be sued, either in his own colony or in this country, for any acts found to be unlawful (*Tandy* v. *Westmorland* (*Earl*) (1792), 27 State Tr. 1246, 1260; *Luby* v. *Wodehouse* (*Lord*) (1865), 17 I. C. L. R. 618; *Sullivan* v. *Spencer* (*Earl*) (1872), 6 I. R. C. L. 173; compare *Musgrave* v. *Pulido* (1879), 5 App. Cas. 102, P. C.). It should be noted that in *Hill* v. *Bigge* (1841), 3 Moo. P. C. C. 465, at p. 480, Lord BROUGHAM cast some doubt upon the correctness of some of the *dicta* in *Tandy* v. *Westmorland*, *supra*; and that no case relating to the Lord Lieutenant has been considered by the House of Lords. For the oaths to be taken by the Lord Lieutenant, see the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 5.

(*u*) Parliamentary Debates, 3rd Series, Vol. CCLXII., 22.

(*v*) The Home Secretary is not responsible for details of administration, his responsibility being rather formal than actual (*ibid.*). There is no statutory authority for the existence of the Irish Office, except in so far as the expenses incurred in connection with it are provided for by Parliament. Statutory recognition of the office of Chief Secretary is to be found in various Acts of Parliament by which powers are conferred upon him, such as the Public Offices (Ireland) Act, 1817 (57 Geo. 3, c. 62), s. 11, conferring upon the Chief Secretary for the time being the office of Keeper of the Privy Seal in Ireland, and the Local Government Board (Ireland) Act, 1872 (35 & 36 Vict. c. 69), by s. 3 of which he is appointed President of the Local Government Board for Ireland.

(*w*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12 (2). See also the Consolidated Fund Act, 1816 (56 Geo. 3, c. 98), s. 3, and the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), s. 2.

(*x*) Consolidated Fund Act, 1816 (56 Geo. 3, c. 98), s. 2.

(*y*) Exchequer Court (Scotland) Act, 1707 (6 Ann. c. 53, c. 26, Ruff.), s. 2. See, too, the Crown Lands (Scotland) Act, 1835 (5 & 6 Will. 4, c. 58), s. 4, whereby the rights of the Crown in Scotland as *ultimus hæres* are vested in the Treasury.

(*a*) Consolidated Fund Act, 1816 (56 Geo. 3, c. 98), ss. 1, 2, 18.

(*b*) *Ibid.*, ss. 2, 14.

(*c*) Succession to the Crown Act, 1707 (6 Ann. c. 41, c. 7, Ruff.), ss. 25, 26; Consolidated Fund Act, 1816 (56 Geo. 3, c. 98), s. 16; and see the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 52, and Sched. H; Representation of the People (Scotland) Act, 1868 (31 & 32 Vict. c. 48), s. 51, and Sched. H; Representation of the People (Ireland) Act, 1868 (31 & 32 Vict. c. 49), s. 11, and Sched. E.

Instruments issued under the hands of any two commissioners are binding (*d*).

The Commissioners constituting the Treasury Board are the First Lord of the Treasury, the Chancellor of the Exchequer (both of whom are members of the Cabinet), and a varying number of junior lords, appointed by the Crown upon the nomination of the First Lord. The Board does not meet in practice. The duties of the members, other than the Chancellor of the Exchequer, are political, and not financial.

First Lord of the Treasury.

181. Under the modern practice the office of First Lord is usually held by the Prime Minister or the leader of the House of Commons (*e*). His duties are almost entirely political; he takes no part in matters of financial administration except in cases where, as Prime Minister, he is called upon to determine questions of policy, or where he is called upon to determine matters upon which the Chancellor of the Exchequer is unable to agree with the heads of other departments. A considerable amount of patronage (*f*) is attached to the office. He is assisted by a Parliamentary Secretary (*g*), under the title of Patronage Secretary to the Treasury, whose principal duty is to act (with the assistance of Junior Lords of the Treasury) as chief Government whip (*h*), and by a Financial Secretary and a Permanent Secretary.

Chancellor of the Exchequer.

182. The Chancellor of the Exchequer is not only a Commissioner of the Treasury; he is appointed by separate patents, and by the delivery of the Exchequer seals, Chancellor of the Exchequer and Under-Treasurer (*i*), as well as Chancellor of the Exchequer for Ireland (*k*). He is assisted by the Parliamentary and the Permanent Secretary to the Treasury.

As a political officer the Chancellor of the Exchequer represents the Treasury in the House of Commons, and is responsible for the financial policy of the Government. He formulates the demands to be made upon Parliament for the annual sums required to carry on the government of the country, adjusts the relationship between revenue and expenditure, and represents his department in Parliament.

Ex officio duties.

183. The Chancellor of the Exchequer is a trustee of the British Museum (*l*), a Commissioner for the Reduction of the

(*d*) Treasury Instruments (Signature) Act, 1849 (12 & 13 Vict. c. 89).
(*e*) See p. 36, *ante*.
(*f*) Select Committee on Official Salaries, 1850, Evidence, p. 1264.
(*g*) House of Commons (Disqualifications) Act, 1801 (41 Geo. 3, c. 52), s. 4.
(*h*) The number of junior lords was reduced from four to three in 1848 (Select Committee on Official Salaries, 1850, Evidence, p. 48), but a fourth junior lord (unpaid) is generally appointed. The principle of selection is that there should be one English, one Scotch, and one Irish Junior Lord of the Treasury (*ibid.*, p. 62). A "whip" in parliamentary usage is intrusted with the duty of securing an adequate attendance of members of the Party at the sittings of the House etc. He also advises the party leaders as to elections, the trend of public opinion etc.
(*i*) Cox, Institutions of English Government, 696.
(*k*) Chancellor of the Exchequer (Ireland) Act, 1823 (4 Geo. 4, c. 7 .
(*l*) 26 Geo. 2, c. 22, 1753, s. 4.

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National Debt (*m*), an Ecclesiastical Commissioner (*n*), the Master of the Mint (*o*), and a member of the Local Government Board (*p*), the Board of Agriculture and Fisheries (*q*), and the Board of Education (*r*). The judicial functions of the Chancellor of the Exchequer were finally abolished in 1873, but he still presides in court over the annual appointment of sheriffs (*s*).

SUB-SECT. 12.—*The Board of Trade.*

Constitution.

184. The Board of Trade means the lords of the committee for the time being of the Privy Council appointed for the consideration of matters relating to trade and foreign plantations (*t*). The Board of Commissioners, who are appointed by Order in Council, never meets in fact, the responsible heads of the department being the President and the Parliamentary Secretary of the Board (*a*).

President.

185. The President is appointed by warrant under the sign manual (*b*), and may be a member of the House of Commons (*c*). He must take the oath of allegiance and official oath on his appointment (*d*). He is assisted by a Parliamentary Secretary (*e*), and by four assistant secretaries.

Authentication of documents.

186. A deed, contract, or other instrument to be executed by or on behalf of the Board of Trade is valid, if executed under the seal of the Board and signed by the President or Parliamentary Secretary (*f*), or if there be neither President nor Parliamentary Secretary, by a principal Secretary of State (*g*).

Functions of Board.

187. The Board exercises administrative functions in matters relating to trade and commerce, under powers conferred by a

(*m*) National Debt Reduction Act, 1786 (26 Geo. 3, c. 31), s. 14. See also title REVENUE.

(*n*) Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. 4, c. 77), s. 1. See title ECCLESIASTICAL LAW.

(*o*) Coinage Act, 1870 (33 & 34 Vict. c. 10), s. 14. See Vol. VI., p. 464.

(*p*) Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 3.

(*q*) Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 1 (1).

(*r*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 1 (2).

(*s*) Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 96, 97. See title SHERIFFS AND BAILIFFS.

(*t*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12 (8). See also, for the title of the Board, the Harbours and Passing Tolls Act, 1861 (24 & 25 Vict. c. 47), s. 65.

(*a*) The Board is the successor to the old Board of Trade and Plantations, which was abolished by Civil List and Secret Service Money Act, 1782 (22 Geo. 3, c. 82), s. 1. The powers of the old Board were transferred to such committee or committees of the Privy Council as His Majesty should appoint to act during pleasure (*ibid.*, s. 15).

(*b*) Board of Trade (President) Act, 1826 (7 Geo. 4, c. 32).

(*c*) *Ibid.* The section provides for a salary being paid to the President; his office is not, by reason of such salary being paid, to be deemed a new office within the meaning of the Succession to the Crown Act, 1707 (6 Ann. c. 41, c. 7, Ruff.), s. 25.

(*d*) Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 5.

(*e*) By the Board of Trade (Parliamentary Secretary) Act, 1867 (30 & 31 Vict. c. 72), a Parliamentary Secretary was substituted for the Vice-President of the Board of Trade.

(*f*) Harbours and Passing Tolls Act, 1861 (24 & 25 Vict. c. 47), s. 67.

(*g*) *Ibid.* The Board has power (*ibid.*, s. 68) to purchase lands required for the public service.

variety of statutes (*h*). The business is divided among the statistical and commercial, railway, harbour, marine, finance, and bankruptcy departments.

The Board has in general no power to sue or be sued. Powers to take proceedings for various purposes are conferred by a number of statutes (*i*).

Board of Trade Inquiries.

The Board has general powers of holding inquiries (*k*), where, under the provisions of any special Act (*l*), it is required or authorised to sanction, approve, confirm, or determine any appointment, matter, or thing or to make any order or do any other act or thing for the purpose of such special Act (*k*). An inquiry held for such purposes, or in pursuance of any general (*m*) or special Act, may be held by any person or persons authorised by the Board (*n*) by order in writing under the hand of the President or of one of the assistant secretaries of the Board (*o*).

SUB-SECT. 13.—*The Local Government Board.*

Constitution.

188. The Local Government Board consists of a President and of certain *ex officio* members, namely, the Lord President of the Council, all His Majesty's principal Secretaries of State for the time being, the Lord Privy Seal, and the Chancellor of the Exchequer (*p*).

The President holds office during pleasure (*q*), and is capable of sitting and voting in the House of Commons (*r*). The Board never meets in practice, so that the President is subject only to the control of Parliament. He is assisted by a Parliamentary Secretary (*s*), and by such other secretaries, assistant secretaries, inspectors, auditors, clerks, messengers, and other officers as the Board, with the sanction of the Treasury, determine (*t*).

Authentication of documents.

189. The Board has an official seal, and any act done or instrument to be executed by or on behalf of the Board may be done or

(*h*) See titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 1; RAILWAYS; SHIPPING AND NAVIGATION; TRAMWAYS AND LIGHT RAILWAYS; WEIGHTS AND MEASURES. As to its management of the foreshore, see p. 142, *post*.

(*i*) See titles BANKRUPTCY; SHIPPING AND NAVIGATION.

(*k*) Board of Trade Arbitrations etc. Act, 1874 (37 & 38 Vict. c. 40), s. 2. As to the costs of such inquiries, *vide ibid.*, s. 3.

(*l*) Defined by the Board of Trade Arbitrations etc. Act, 1874 (37 & 38 Vict. c. 40), s. 4, as a local and personal Act or an Act of a local and personal character, including a provisional order of the Board confirmed by Act of Parliament, and a certificate granted by the Board under the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121).

(*m*) For inquiries into shipping casualties, see the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 465, and into railway accidents, the Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78).

(*n*) Board of Trade Arbitrations etc. Act, 1874 (37 & 38 Vict. c. 40), s. 2.

(*o*) *Ibid.*, s. 4.

(*p*) Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 3.

(*q*) *Ibid.* The Act contains no provisions compelling the President of the Local Government Board to take the oath of allegiance and official oath, though such an obligation was imposed on the President of the Poor Law Board by the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 5.

(*r*) Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 4.

(*s*) *Ibid.*

(*t*) *Ibid.*, s. 3.

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executed in the name of the Board by the President or by any member of the Board, or by a secretary or assistant secretary, if such secretary or assistant secretary is thereunto authorised by any general order of the Board. A rule, order, or regulation made by the Board is valid if made under its seal and signed by the President or one of the *ex officio* members and countersigned by a secretary or assistant secretary (*a*).

Functions of Local Government Board.

The Board exercises general supervision over local authorities, its work falling into three main divisions, namely, poor law, public health, and local finance (*b*).

SUB-SECT. 14.—*The Board of Agriculture and Fisheries.*

Board of Agriculture and Fisheries.

190. The Board of Agriculture and Fisheries (*c*) consists of the Lord President of the Council, the principal Secretaries of State, the First Commissioner of the Treasury, the Chancellor of the Exchequer, the Chancellor of the Duchy of Lancaster, and the Secretary for Scotland, as well as of such other persons as the Crown may appoint during pleasure (*d*). The President, who is appointed by the Crown, must be a member of the Privy Council, and holds his office during pleasure (*e*). He is capable of sitting and voting in the House of Commons (*f*); and he takes the oath of allegiance and official oath (*g*).

SUB-SECT. 15.—*The Board of Education.*

Board of Education.

191. The Board of Education (*h*) consists of a President, the Lord President of the Council (unless he be appointed President of the Board), the principal Secretaries of State, the First Commissioner of the Treasury, and the Chancellor of the Exchequer (*i*).

The President is appointed by the Crown, and holds office during

(*a*) Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 5.

(*b*) The Board is invested with the powers of the Poor Law Board, of the Secretaries of State, and of the Privy Council contained in the statutes set out in the schedule to the Local Government Board Act, 1871 (34 & 35 Vict. c. 70), ss. 2, 6, 7. For the functions of the Board, see titles LOCAL GOVERNMENT; POOR LAW; PUBLIC HEALTH ETC. For suits by the Local Government Board under the Housing of the Working Classes Act, see titles COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., 1; PUBLIC HEALTH ETC.

(*c*) For the powers and duties of the Board, see titles AGRICULTURE, Vol. I., 297; FISHERIES; and the other titles indicated in Vol. I., 297, 298.

(*d*) Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 1 (1); Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31). The Board in fact never meets, the duties and powers being discharged and exercised by the President with the assistance of his staff.

(*e*) *Ibid.*, s. 1 (2).

(*f*) *Ibid.*, s. 8 (1).

(*g*) *Ibid.*, s. 8 (2).

(*h*) For the powers and duties of the Board, see title EDUCATION.

(*i*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 1 (2). The Board in fact never meets, the duties and powers being discharged entirely by the President with the assistance of his staff. By s. 1 (3) it is provided that the Vice-President of the Committee of the Privy Council on Education should be a member of the Board, but that the office should be abolished on the next vacancy.

pleasure (*k*); he is capable of sitting and voting in the House of Commons (*l*).

The Board is assisted by a consultative committee established by Order in Council (*m*), consisting, as to not less than two-thirds of its members, of persons qualified to represent the views of universities and other bodies interested in education for the purpose of advising the Board on any matters referred to it (*n*).

The staff is appointed by the Board with the sanction of the Treasury (*o*).

The Board may sue and be sued as and in the name of the Board of Education (*p*). The Board has an official seal, of which official and judicial notice is taken (*q*).

SUB-SECT. 16.—*The Post Office.*

192. The Postmaster-General (*r*) is appointed by letters patent under the Great Seal (*s*), and is the responsible head of the Post Office, both as regards administration and in Parliament (*t*). He is a body corporate, with a seal, for the purpose of holding lands and of transmitting them to his successors in office, in trust for the Crown (*a*). Postmaster-General.

The Postmaster-General has power, with the consent of the Treasury, to purchase (*b*) and to sell and exchange land (*c*). A

(*k*) Board of Education Act, 1899 (62 & 63 Vict. c. 33), s. 1 (4).

(*l*) *Ibid.*, s. 8 (1).

(*m*) *Ibid.*, ss. 4, 5; see Orders in Council of 7th August, 1900, and 26th March, 1907.

(*n*) *Ibid.*, ss. 4, 5; see Order in Council of 2nd March, 1906, providing for the formation and keeping of a register of teachers and establishing a teachers' registration council.

(*o*) *Ibid.*, s. 6. By s. 8 (2) it is provided that, after the abolition of the office of Vice-President of the Committee of the Privy Council on Education, one of the secretaries of the Board shall be capable of sitting and voting in the House of Commons.

(*p*) *Ibid.*, s. 7 (1).

(*q*) *Ibid.*, s. 7 (2). For the provisions as to authentication of the seal and for the reception in evidence of documents duly authenticated, see s. 7 (2), (3), (4).

(*r*) The style is recognised by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12 (11). The Postmaster-General takes the oath of allegiance and official oath (Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 5), and subscribes the declaration contained in the Schedule to the Post Office (Management) Act, 1837 (7 Will. 4 & 1 Vict. c. 33), s. 10.

(*s*) Post Office (Management) Act, 1837 (7 Will. 4 & 1 Vict. c. 33), s. 2; Post Office Act, 1908 (8 Edw. 7, c. 48). s. 33 (1).

(*t*) For the right to sit and vote in the House of Commons, see the Post Office (Postmaster-General) Act, 1866 (29 & 30 Vict. c. 55); see also the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 52, and Sched. H; Representation of the People (Scotland) Act, 1868 (31 & 32 Vict. c. 48), s. 51, and Sched. H; Representation of the People (Ireland) Act, 1868 (31 & 32 Vict. c. 49), s. 11, and Sched. E. For his functions generally, and suits by and against him, see titles POST OFFICE; TELEGRAPHS AND TELEPHONES.

(*a*) Post Office (Duties) Act, 1840 (3 & 4 Vict. c. 96), s. 67; Post Office Act, 1908 (8 Edw. 7, c. 48), s. 33 (2). When the Act of 1908 comes into operation on May 1st, 1909, a great number of the earlier Acts will be repealed. The Postmaster-General is not incorporated for all purposes connected with his official work (*Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178, at p. 192, C. A.).

(*b*) Post Office (Land) Act, 1881 (44 & 45 Vict. c. 20), s. 3 (incorporating the Lands Clauses Acts); Post Office (Sites) Act, 1885 (48 & 49 Vict. c. 45); Post Office Act, 1908 (8 Edw. 7, c. 48), ss. 45, 46.

(*c*) Post Office Lands Act, 1863 (26 & 27 Vict. c. 43); Post Office Act, 1908 (8 Edw. 7, c. 48), s. 47.

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person dealing with him in respect of land, or rights in or over land, either as vendor, lessor, purchaser, lessee or otherwise, is not bound or entitled to inquire whether such consent has been given or whether such dealing has in fact been authorised by any Post Office Act (*d*).

Contracts.

193. Upon the appointment of a person as Postmaster-General the benefit of all contracts, bonds, securities, and things in action, which shall have been vested in his predecessor in office, are transferred to and vested in the Postmaster-General in the same manner as if his name had been inserted in all such contracts, bonds and securities (*e*).

Privileges.

194. The Postmaster-General (and any officer of the Post Office) is exempt from serving as a mayor or sheriff, or in any ecclesiastical or corporate or parochial or other public office or employment, or on a jury or inquest, or in the militia (*f*).

SUB-SECT. 17.—*The Officers of the Household.*

The Royal Household.

195. The various offices connected with the royal household, which were originally of an hereditary nature, and descendible in certain families, have long ceased to be such (*g*); and, except with regard to the forms and ceremonies observed at the coronation of the Sovereign, when the privileges of some of the ancient hereditary officers are still exercisable subject to allowance by the Court of Claims (*h*), the duties and functions connected therewith are now performed by persons appointed for that purpose by the Sovereign, and selected for the most part, as to the principal offices, from amongst the members of the party in power, either in the Lords or Commons (*i*). Moreover, it is generally recognised as the constitutional practice (*k*) that the principal officers of the household should be included in the political arrangements made on a change of administration, and retire from office with the party to which they owe their appointment (*l*), the offices (when filled) to which this rule

(*d*) Post Office Act, 1891 (54 & 55 Vict. c. 46), s. 6; Post Office Act, 1908 (8 Edw. 7, c. 48), s. 47 (3).

(*e*) Post Office Lands Act, 1863 (26 & 27 Vict. c. 43), s. 6; Post Office Act, 1908 (8 Edw. 7, c. 48), s. 33.

(*f*) Post Office (Management) Act, 1837 (7 Will. 4 & 1 Vict. c. 33), s. 12; Post Office Act, 1908 (8 Edw. 7, c. 48), s. 43. These exemptions apply to Scotland (Post Office Act, 1891 (54 & 55 Vict. c. 46), s. 9).

(*g*) The officers of the household originally formed the first circle round the Crown, and in them is to be found the first elements of a ministry of State (see Stubbs, Constitutional History, Vol. I., 343). The principal officers in the Norman households appear to have been the treasurer, chamberlain, steward, butler, constable, and marshal, and these eventually became hereditary (*e.g.* the constable, steward, chamberlain and butler, *temp.* Henry II.; see *ibid.*, 344, 345, 353, 354), whilst as to certain of them duplicate offices were created for State or ministerial purposes (*e.g.* the treasurer, *ibid.*, 355). Certain of the latter now only appear at the coronation ceremonies: see Vol. VI., pp. 327 *et seq.*

(*h*) See Vol. VI., pp. 328 *et seq.*

(*i*) The principal officers are for the most part peers or members of the House of Commons (Todd, Parliamentary Government in England, Vol. II., 723).

(*k*) This usage appears to have become recognised from the reign of George III. (see Todd, *supra*, Vol. I., 188, 189).

(*l*) See Vol. VI., pp. 327 *et seq.*, as to offices connected with the coronation.

applies being, it is said, as follows (*m*): the Lord Steward; the Lord Chamberlain; the Vice-Chamberlain; the Master of the Horse; the Treasurer of the Household; the Comptroller of the Household; the Captain of the Corps of Gentlemen-at-Arms; the Captain of the Corps of Yeomen of the Guard; the Master of the Buckhounds; the Chief Equerry or Groom-in-Waiting; the Clerk Marshal; and the Lords-in-Waiting.

Mistress of the Robes.

196. In the case of a queen regnant, the practice generally accepted as constitutional appears to be that, in addition to the above officers, the Mistress of the Robes and the Ladies of the Bed-chamber should be included in the political arrangements made on a change of administration, where such offices are held by ladies connected with outgoing ministers, but not where they are held by ladies without any pronounced political connection (*n*). This rule, however, does not appear to have been always strictly enforced (*o*).

Lord Chamberlain.

197. The duties of the various officers are mainly connected with the interior arrangements immediately connected with the royal household, or the forms and ceremonies observed at court functions (*p*). The Lord Chamberlain, however, exercises important powers with regard to the licensing of theatres in and about London and places where the Sovereign occasionally resides (*q*),

(*m*) Todd, Parliamentary Government in England, Vol. II., 163, 164.

(*n*) Difficulties arose as to the change of household officers by the Prince Regent on the attempted formation of a ministry by Lord Moira in 1812, though the constitutional principle appears to have been recognised both by the Prince Regent and in Parliament, where it was stated that a change in the particular circumstances was not deemed advisable (see Parliamentary Debates, 2nd ser., Vol. XXIII., 453). The bed-chamber question in 1839 led to Sir R. Peel's abandonment of the task of forming a ministry, the Queen having declined to comply with his request for a change of the ladies of the household (see Parliamentary Debates, 3rd ser., Vol. XLVII., 983, 985, 987). A minute drawn up by the Melbourne ministry expressed the view that "it is reasonable for the efficiency and stability of the administration, and for giving those marks of the constitutional support of the Crown which are required to enable it to act usefully to the public service, that the great officers of the court and situations in the royal household held by members of Parliament should be included in the political arrangements made on a change of administration, but that a similar principle should not be applied to the offices held by ladies of Her Majesty's household" (Parliamentary Debates, 3rd ser., Vol. XLVII., 1001). Two years later, when Sir R. Peel was again called to office, the principle affirmed by him appears to have been accepted as constitutional by the Queen.

(*o*) See Anson, Law and Custom of the Constitution, 3rd ed., Vol. II., 125, citing Gladstone, Gleanings of Past Years, Vol. I., 40.

(*p*) As to the household offices generally, see Dodd's Manual of Dignities; Murray's Handbook.

(*q*) Theatres Act, 1843 (6 & 7 Vict. c. 68), ss. 2, 3. His jurisdiction for licensing theatres is exclusive as to all theatres (not being theatres authorised by letters patent) within the parliamentary boundaries of the cities of London and Westminster, and of the boroughs of Finsbury and Marylebone, the Tower Hamlets, Lambeth, Southwark, New Windsor (Berks), and Brighthelmstone (Sussex). In other places where the Sovereign occasionally resides licences may be granted by the justices subject to certain restrictions during the residence there of the Sovereign (*ibid.*, s. 3; and see generally title THEATRES).

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and as to the allowance or disallowance of every new stage play, prologue, or epilogue, and of every new act, scene, or part, to be added to an old stage play, prologue, or epilogue, intended to be produced and acted for hire at any theatre in Great Britain (*r*).

Part VII.—The Hereditary and Private Revenues of the Crown.

SECT. 1.—*In General.*

SUB-SECT. 1.—*Sources of the Hereditary Revenue.*

Hereditary revenues of the Crown.

198. The hereditary revenues of the Crown are derived principally from such lands as are or may become vested in the Sovereign in his body politic in right of the Crown; and they have, in general, been rendered inalienable except in accordance with statutory provisions (*a*).

In addition to these there are the revenues derived from the various prerogative rights and privileges relating to property enjoyed by the Crown. Such are the right to *bona vacantia*, including waifs, wrecks, estrays, and treasure trove; the prerogative rights relating to royal mines, fisheries, royal fish and swans; the revenues derived from droits of the Admiralty, and from the courts of justice, and from fines, recognisances, legal fees, and forfeitures (*b*), and formerly deodands (*c*), and from prerogatives connected with the Church, such as the temporalities of bishoprics during vacancy, corodies, first-fruits, and tenths (*d*).

Revenue formerly derived from taxation.

199. Certain revenues derived from taxation, which were formerly settled upon the Crown by statute, have been surrendered to the nation in the manner presently to be mentioned (*e*), and are now either paid into the Consolidated Fund to form part of the public revenue, or the Acts by which they were conferred have been repealed, with a saving of the rights of the Crown. These are the revenues derived from the Post Office, which are now paid into the

(*r*) Theatres Act, 1843 (6 & 7 Vict. c. 68), ss. 12—15; and see generally title THEATRES.

(*a*) Under the Crown Lands Act, 1702 (1 Ann. c. 1; stat. 1, c. 7, Ruff.); and see p. 147, *post*.

(*b*) As to Admiralty droits, see title ADMIRALTY, Vol. I., 76, 77. Fines etc. were formerly chargeable with certain judicial salaries, but are now paid into the Consolidated Fund with the rest of the hereditary revenues.

(*c*) Deodands were such personal chattels as caused the death of a person by misadventure, and were forfeited to the Crown if death occurred within a year and a day (see Bac. Abr. tit. Deodand; *Foxley's Case* (1601), 5 Co. Rep. 109 a, at 110 b). They were abolished as from 1st September, 1846, by statute 9 & 10 Vict. c. 62.

(*d*) As to temporalities of bishoprics, corodies, first-fruits, and tenths, see Vol. VI., pp. 392 *et seq.*, and title ECCLESIASTICAL LAW.

(*e*) See p. 109, *post*.

Consolidated Fund (*f*); the hereditary excise on beer, ale, and cider, which is no longer chargeable; certain duties derived from wine licences (*g*); and the 4 per cent., or West India, duties, now repealed (*h*).

SUB-SECT. 2.—*Surrender of the Hereditary Revenue.*

The Civil List.

200. Since the accession of George III. (*i*) it has been customary for each succeeding Sovereign to surrender the hereditary revenues to the nation for the term of his life (*j*), in return for a fixed annual income, known as the Civil List (*k*). As a result of the various surrenders, which are cumulative in effect, the produce of all the hereditary revenues in England, Scotland, and Ireland (including the revenues derived from the Osborne Estate (*l*), but excepting

(*f*) The Post Office revenues were settled upon the Crown by statute in 1685 (1 Jac. 2, c. 12), a portion being diverted to public uses in 1787 (27 Geo. 3, c. 13, s. 48). These Acts were repealed by the Statute Law Revision Acts, 1863 (26 & 27 Vict. c. 125) and 1871 (34 & 35 Vict. c. 116), respectively, the latter Act, by s. 1, expressly saving the rights of the Crown. The terms of the saving clause are similar to those set out in note (*g*), *infra*.

(*g*) The hereditary excise and a duty on wine licences were settled upon the Crown in 1660 for ever in lieu of the revenues arising from the military tenures, and from the rights of pre-emption and purveyance, which were abolished by the same Act (12 Car. 2, c. 24, ss. 15—27). The hereditary excise was suspended by the Civil List Act, 1837 (1 & 2 Vict. c. 2, s. 7), with a saving of the rights of the Sovereign's successors. The Civil List Act, 1901 (1 Edw. 7, c. 4), s. 9 (3), directs that it shall cease to be chargeable (see note (*o*), p. 110, *post*). The hereditary duties on wine licences were abolished in 1757, and a sum of £7,002 derived from stamp duties on the new wine licences settled upon the Crown instead (statute 30 Geo. 2, c. 19, ss. 7, 13). This sum of £7,002 was directed to be paid into the public revenue by the statute 1 Geo. 3, c. 1, s. 3. The two latter Acts have been repealed by the Statute Law Revision Acts, 1870 and 1867 (33 & 34 Vict. c. 69, s. 1; 30 & 31 Vict. c. 59, s. 1), but the repeals are not to affect any right to any hereditary revenues of the Crown or any charges thereupon, or prevent the repealed enactment from being enforced for the collection of any such revenues or otherwise in relation thereto.

(*h*) Some importance still attaches to the history of these revenues owing to the legal possibility of resumption of the hereditary revenues by the Crown, in which case the nation would presumably be bound to make an equivalent compensation to the Crown therefor.

(*i*) See the statute 1 Geo. 3, c. 1. After 1688, and before the reign of George III., the hereditary revenues were settled upon the Crown by statute, but the principle of contribution to the national expenditure was preserved by the Acts. See the preambles to the Crown Lands Act, 1702 (1 Ann. c. 1; 1 Ann., stat. 1, c. 7, Ruff.), and the statutes 1 Geo. 1, stat. 1, c. 1; 1 Geo. 2, stat. 2, c. 1.

(*j*) Now for the life of His present Majesty and six months after (see p. 271, *post*).

(*k*) So called because the salaries of the Lord Chancellor, judges, and of the civil service were originally charged upon it (see the statute 1 Geo. 3, c. 1, s. 6).

(*l*) Under the will of the late Queen Victoria this estate passed to His present Majesty for life, with remainder to the Prince of Wales for life and various remainders over. As a memorial to the late Queen and on the occasion of His present Majesty's coronation, however, the estate, as described in plans deposited with the Clerk of Parliaments and the Clerk of the House of Commons, was directed by statute to be vested in the Crown in right of the Crown, and to cease to be part of the private estates of the Sovereign. S. 1 of the Civil List Act, 1901 (1 Edw. 7, c. 4), is to apply thereto (Osborne Estate Act, 1902 (2 Edw. 7, c. 37), preamble, s. 1; and see p. 190, *post*).

SECT. 1. In General.

those derived from the Duchies of Lancaster and Cornwall and the Principality of Scotland (*m*)), and the produce of the small branches of the hereditary revenue (*n*), and of the casual revenue arising from any droits of Admiralty or of the Crown, together with the surplus revenues of Gibraltar or any other possession of the Crown out of the United Kingdom, and all casual revenues at home and abroad, are to be paid into the Exchequer and form part of the Consolidated Fund during the present reign and six months thereafter (*o*). In return for this surrender, in addition to the allowances made to certain members of the Royal Family, His Majesty receives a fixed annual income, still known as the Civil List, though now cleared of all charges for the Civil Service and other public expenses, which are thrown directly on the Consolidated Fund (*p*).

(*m*) The revenues of the Duchies of Lancaster and Cornwall were expressly excluded from the original surrender by George III. (see note (*o*), *infra*), and have been since retained by the Crown. The revenues of the Duchy of Cornwall belong to the heir apparent when such a person exists, as do also those of the Principality of Scotland. As to these, see pp. 238, 270, *post*. A surrender of the revenues of Lancaster was suggested in 1830, but was successfully resisted by William IV. The question of the nation's right to the revenues of the Duchies of Lancaster and Cornwall was again raised on the introduction of the Civil List Bill in the House of Lords in 1837 (see Parliamentary Debates, 3rd ser., Vol. XXXIX., *per* Lord Brougham, pp. 1356—1365, where he insists on the right of the nation to these revenues. As to the legal title to the Duchies generally (from which it follows, it is submitted, that Lord Brougham's view could not be upheld, see pp. 217, 238, *post*). The revenues of the former county palatine of Durham (as to which see pp. 114, 216, *post*), in so far as they are revested in the Crown (see *ibid.*), have become merged in the rest of the hereditary revenues, and are therefore included in the surrender.

(*n*) As to these, see pp. 209 *et seq.*, *post*.

(*o*) Civil List Act, 1901 (1 Edw. 7, c. 4), s. 1. This is effected by reference to the surrender made by Queen Victoria under the Civil List Act, 1837 (1 & 2 Vict. c. 2), which, with the previous Civil List Acts, is cumulative in effect, the sequence of the various surrenders being as follows: George III. surrendered the land revenues of the Crown in England, then worth some £89,000 per annum (those of the Duchies of Lancaster and Cornwall being expressly excepted), the hereditary revenues derived from the Post Office (see note (*f*), p. 109, *ante*), together with the hereditary excise duties on beer, ale, and cider (see note (*g*), p. 109, *ante*), the annuity of £7,002 settled upon the Crown by statute (see *ibid.*), and the small branches of the hereditary revenue, in return for an annuity of £800,000 per annum, upon which were charged the salaries of the judges and civil service, certain pensions, and other public expenses (statute 1 Geo. 3, c. 1). The hereditary revenues of Ireland were surrendered by an Act of the Irish Parliament later in the same reign (32 Geo. 3, c. 1). A similar arrangement was continued by George IV. (see the statutes 1 Geo. 4, c. 1; 1 & 2 Geo. 4, c. 31) and by William IV., who surrendered, in addition, the hereditary revenues of Scotland (except those of the Principality) and the 4 per cent., or West India, duties, since repealed. This surrender included the whole of the hereditary revenues except those mentioned above (statute 1 Will. 4, c. 25). A similar arrangement was made by Queen Victoria, who received a fixed income of £385,000; the hereditary excise duties on beer, ale, and cider being suspended, with a saving of the rights of successors, the last item of public expenditure formerly charged on the Civil List, namely, £10,000 per annum for secret service money, being thrown upon the Consolidated Fund (Civil List Act, 1837 (1 & 2 Vict. c. 2)). Under the Civil List Act, 1901 (1 Edw. 7, c. 4), the hereditary excise duties cease to be chargeable, and the annual sums payable to His Majesty and other members of the Royal Family are free of all charges for public government or pensions (see pp. 271 *et seq.*, *post*).

(*p*) See note (*o*), *supra*.

The hereditary revenues so surrendered are legally liable to resumption by the Sovereign succeeding on the demise of His present Majesty, but in such an event they would presumably be liable to contribution towards the expenses of public government (*q*); and the surrender having become customary since 1760, resumption by the Crown may be said to be beyond the possibility of contemplation in practice (*r*).

Resumption of surrendered revenues.

SUB-SECT. 3.—*Sources of the Private Revenue.*

201. The revenues which the Crown enjoys for the upkeep of the royal household, or for the Sovereign's private enjoyment, are derived from (1) the annual income, known as the Civil List, granted by Parliament out of the public funds in the manner previously stated (*s*). This is apportioned to meet the various heads of the expenditure required for the maintenance of the royal household, the privy purse, and of certain members of the Royal Family (*a*); (2) the revenues of the Duchy of Cornwall (when not vested in the Prince of Wales) and the Duchy of Lancaster, and of the Principality of Scotland (when not vested in the Prince of Wales), which, though of a hereditary nature and descendible with the Crown, have escaped the operation of the various Civil List Acts and consequent surrender (*b*); and (3) the revenues derived from such estates as the Sovereign enjoys in his body natural as distinct from his body politic, of which, not being subject to any hereditary rights, he may dispose freely, although the manner in which such estates may be dealt with is regulated to a large extent by statute (*c*).

Sources of private revenue.

SECT. 2.—*Surrendered Revenues arising from Crown Lands.*

SUB-SECT. 1.—*General Nature of Crown Rights.*

(1) *Lands enjoyed in Right of the Crown.*

202. The lands which the Sovereign enjoys in his body politic in right of the Crown comprise the remaining demesne lands (*d*) which were acquired at the original distribution of landed property, or which came to the Crown afterwards by forfeiture or other means (*e*); the lands and rights relating to land which are enjoyed

Crown lands.

(*q*) See the references in note (*o*), p. 110, *ante*, and note (*r*), *infra*.

(*r*) According to Spencer Walpole, "a surrender of this kind once made is virtually irrevocable" (Walpole's History of England, ed. 1880, Vol. III., 395). Freeman states the principle of surrender as being now governed by "a custom strong as law" (Freeman, Growth of the English Constitution, ed. 1873, p. 140). See also the debate on the Civil List Act, 1837 (1 & 2 Vict. c. 2) (Parliamentary Debates, 3rd ser., Vol. XXXIX., pp. 180, 181, 1356—1365).

(*s*) See pp. 109, 110, *ante*.

(*a*) See pp. 271 *et seq.*, *post*.

(*b*) See note (*m*), p. 110, *ante*, as to the right of the Crown to these revenues.

(*c*) See pp. 273 *et seq.*, *post*.

(*d*) Before the passing of the Crown Lands Act, 1702 (1 Ann. c. 1; stat. 1, c. 7, Ruff.), by which the alienation of Crown land was restrained, the land revenues of the Crown had been greatly impoverished by numerous grants to subjects, especially under William III. (see 1 Bl. Com., 14th ed., 286).

(*e*) Demesne lands are so defined by Blackstone (see 1 Bl. Com., 14th ed., 286).

SECT. 2. Surrendered Revenues arising from Crown Lands.

by virtue of the prerogative, such as foreshore, lands formed by alluvion or left bare by diluvion, and royal mines, as also the lands and rights which are acquired by virtue of the prerogatives of escheat and forfeiture (*f*). To these must also be added, it seems, such fee simple lands enjoyed by the Sovereign in his body natural as remain undisposed of by grant, will, or otherwise under the Crown Private Estates Acts (*g*).

(2) *The Crown's Right to the Foreshore.*

Foreshore.

203. The Crown is by prerogative right the *primâ facie* owner of all lands covered by the narrow seas adjoining the coast, or by arms of the sea or public navigable rivers (*h*), and also of the foreshore, or land between high and low water mark (*i*), the right being limited landwards to the medium line of high tide between spring and neap tides (*k*).

In Scotland the right to the soil extends, it seems, from the coast outwards to the three-mile limit (*l*).

Public rights.

204. The right of the Crown in the soil is, however, subject to the *jus publicum*, or public right of navigation and of fishing in the sea (*m*), and rights ancillary thereto (*n*), as also to the right of

(*f*) As to Crown rights to foreshore, see *infra;* as to alluvion and diluvion, p. 116, *post;* as to royal mines, *ibid.* As to escheat, see titles CROWN PRACTICE; REAL PROPERTY AND CHATTELS REAL. As to forfeiture, see titles CRIMINAL LAW AND PROCEDURE; REAL PROPERTY AND CHATTELS REAL.

(*g*) Crown Private Estate Act, 1800 (39 & 40 Geo. 3, c. 88), s. 5; Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), s. 7. See also pp. 273 *et seq.*, *post.*

(*h*) Hale, De Jure Maris, Hargrave, Law Tracts, p. 10; Bac. Abr. tit. Prerogative, B, 3; and see *Bulstrode* v. *Hall* (1663), 1 Sid. 148. A "navigable creek or arm of the sea" in the legal sense must be affected by the ebb and flow of ordinary tides (*Ilchester* (*Earl*) v. *Raishleigh* (1889), 61 L. T. 477).

(*i*) Hale, De Jure Maris, Hargrave, Law Tracts, p. 14; Bac. Abr. tit. Prerogative, B, 3. The right is *primâ facie* in the Crown, and the burden of proof to the contrary is on a claimant (*A.-G.* v. *Richards* (1795), 2 Anst. 603). As to mines under the foreshore, see p. 118, *post.*

(*k*) *A.-G.* v. *Chambers* (1854), 4 De G. M. & G. 206; *Philpot* v. *Bath* (1904), 21 T. L. R. 634, C. A.

(*l*) *Lord Advocate* v. *Wemyss*, [1900] A. C. 48, H. L., *per* Lord WATSON, at p. 66. The same principle would, probably, be applicable to other British territory. *Quære* whether a valid grant of such soil can be made (*ibid.*).

(*m*) Hale, De Jure Maris, Hargrave, Law Tracts, pp. 10, 17; *A.-G.* v. *Parmeter* (1811), 10 Price, 378; affirmed H. L. (1813), *ibid.*, 412.

(*n*) *Brinckman* v. *Matley*, [1904] 2 Ch. 313, C. A.; *Fitzhardinge* (*Lord*) v. *Purcell*, [1908] 2 Ch. 139, *per* PARKER, J., at pp. 166, 167. There is no common law right of bathing from the foreshore (*Blundell* v. *Catterall* (1821), 5 B. & Ald. 268; *Brinckman* v. *Matley*, *supra*), or of holding meetings on or passing over the foreshore when dry, except for purposes connected with navigation or fishing (*Llandudno Urban Council* v. *Woods*, [1899] 2 Ch. 705; *Brinckman* v. *Matley*, *supra*). The public have no general right of shooting over the foreshore (*Fitzhardinge* (*Lord*) v. *Purcell*, *supra*), and the right to shoot wild duck (or, perhaps, other birds or animals) on the foreshore, being in the nature of a *profit à prendre*, cannot be claimed by custom (*ibid.*). A custom to fix moorings on the foreshore is good (*A.-G.* v. *Wright*, [1897] 2 Q. B. 318, C. A.), or to spread nets upon land above high-water mark (*Mercer* v. *Denne*, [1905] 2 Ch. 538, C. A.; see also the White Herring Fisheries Act, 1771 (erroneously printed 1871 in the Short Titles Act, 1896 (59 & 60 Vict. c. 14)) (11 Geo. 3, c. 31), s. 11). But

owners of adjoining land to have access to the sea at all times for purposes of navigation (*o*).

Prescription.

205. The right of the Crown to the soil covered by arms of the sea and navigable rivers, or to the foreshore, may become vested in a subject by grant or prescription (*p*), but the grantee can only take subject to the rights of the public (*q*), the grant being void where it is detrimental to such rights (*r*).

Protection of Crown rights.

206. In order to protect the Crown's interests, one month's notice must be given to the Board of Trade, and also, as to land in the Duchies of Lancaster or Cornwall, to the proper officers of the Duchies, and in all other cases also to the Commissioners of Woods, upon an application for registration of title to property which comprises land below high-water mark at ordinary spring tides; and in the case of registration otherwise than with a possessory title the registrar may not register the land until he is satisfied that the notice has been given (*s*).

Duchy of Cornwall.

207. Foreshore in the Duchy of Cornwall belongs *primâ facie* to the Prince of Wales, by virtue of the parliamentary grant to the Black Prince, and therefore cannot be alienated without statutory authority (*t*). Enjoyment by the owner of an adjoining manor

the latter right by statute, and, *semble*, by custom, ceases when the ground is inclosed (*Campbeltown Shipbuilding Co.* v. *Robertson* (1898), 35 Sc. L. R. 722). Permitting the public to wander on the sand of the foreshore does not imply dedication to the public (*Brinckman* v. *Matley*, [1904] 2 Ch. 313, C. A.). As to rights relating to the foreshore generally, see title WATERS AND WATERCOURSES.

(*o*) *Coppinger* v. *Sheehan*, [1906] 1 I. R. 519.

(*p*) Hale, De Jure Maris, Hargrave, Law Tracts, pp. 10, 17; Bac. Abr. tit. Prerogative, B, 3; *Re Walton-cum-Trimley Manor, Ex parte Tomline* (1873), 28 L. T. 12; *Beaufort (Duke)* v. *Swansea Corporation* (1849), 3 Exch. 413. As to the admissibility of acts of ownership as evidence that the foreshore passed under the grant of an adjoining manor or land, though not expressly mentioned, see *Vandeleur* v. *Glynn*, [1905] 1 I. R. 483, 509, C. A.; affirmed as *A.-G. for Ireland* v. *Vandeleur*, [1907] A. C. 369 (building quay on foreshore and taking tolls); see also Vol. VI., p. 484. In *Scratton* v. *Brown* (1825), 4 B. & C. 485, a grant of "sea grounds, shores, and oyster layings" was held to pass the foreshore. Acts by a third party, such as placing piles upon the foreshore, may support an easement, but are not sufficient to displace the title of the Crown's grantee (*Philpot* v. *Bath* (1904), 21 T. L. R. 634, C. A.). The ownership of a several fishery over the foreshore raises the presumption that the soil of the foreshore belongs to the owner of the fishery (*A.-G.* v. *Emerson*, [1891] A. C. 649).

(*q*) As to grants of foreshore, see *A.-G.* v. *Burridge* (1822), 10 Price, 350; *A.-G.* v. *Parmeter* (1811), 10 Price, 378; affirmed H. L. (1813), *ibid.* 412; as to grants of the soil in creeks and navigable rivers, *Colchester Corporation* v. *Brooke* (1845), 7 Q. B. 339; *Gann* v. *Whitstable (Free Fishers)* (1863), 11 H. L. Cas. 192. As to erections between high and low water mark in tidal rivers constituting a nuisance to the public, see *A.-G.* v. *Johnson* (1819), 2 Wils. (CH.) 87; and practically the same case, *R.* v. *Grosvenor (Lord)* (1819), 2 Stark. 511. See also title WATERS AND WATERCOURSES.

(*r*) *A.-G.* v. *Parmeter*, *supra*.

(*s*) Land Transfer Acts, 1875 (38 & 39 Vict. c. 87), s. 66, and 1897 (60 & 61 Vict. c. 65), s. 18, Sched. I. See also p. 177, *post*. As to registration in Ireland, see the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), s. 79.

(*t*) *Lopez* v. *Andrew* (1826), 3 Man. & Ry. (K. B.) 329, note (a); see also *Penryn Corporation* v. *Holm* (1877), 2 Ex. D. 328. As to the title to the Duchy, see p. 238, *post*.

SECT. 2. Surrendered Revenues arising from Crown Lands.

may, however, raise the presumption that it is vested in him by parliamentary grant (*a*). The rights to the foreshore as between the Crown and the Duke of Cornwall are now regulated by statute (*b*).

County palatine of Durham.

208. The prerogative rights relating to the foreshore in the county palatine of Durham were formerly vested in the Bishop of Durham as incident to the franchise of the county palatine. These rights have since the 23rd July, 1858, become vested in the Crown as part of the hereditary possessions and land revenues of the Crown (*c*), subject to certain leases previously granted by the Bishop of Durham, and to certain exceptions (*d*).

Transfer to the Crown.

The rights so transferred included all the right, title, and interest of the Crown in right of the county palatine, and also all the estate, right, title, and interest whatsoever of or to which the Bishop of Durham or the Ecclesiastical Commissioners were seised or entitled on the above date (*e*), either in right of or as part or parcel of the county palatine or see of Durham, or of any lordship, manor, or seignory, forming part of the possessions of the county palatine or see respectively, in and to the soil and freehold of the beds and shores of the sea below high-water mark, and also (except as mentioned below) in and to any inclosures, embankments, or encroachments made therefrom or thereupon respectively, within or adjacent to the county of Durham (*f*).

The transfer also included similar interests in and to any stocks, funds, securities, or moneys standing in the name of the Accountant-General of the Court of Chancery (*g*), representing the purchase-money or value of any part of the beds and shores as above mentioned, subject to any dispositions of the interest of the see of Durham in such stocks etc. which had been lawfully made by the bishops of Durham prior to the 23rd July, 1858 (*h*).

Exceptions from the transfer.

209. The transfer did not apply to Holy Island, situate in Islandshire, in the county palatine, and did not transfer to or vest in the Crown the right or title of the Bishop of Durham, or

(*a*) *Lopez* v. *Andrew* (1826), 3 Man. & Ry. (K. B.) 329, note (a).

(*b*) Cornwall Submarine Mines Act, 1858 (21 & 22 Vict. c. 109). For the provisions of the Act, see pp. 258 *et seq.*

(*c*) The *jura regalia* of the county palatine were previously vested in the Crown as a franchise separate from the Crown by the Durham County Palatine Act, 1836 (6 & 7 Will. 4, c. 19), but the latter Act has been amended by the Durham County Palatine Act, 1858 (21 & 22 Vict. c. 45), ss. 2, 5, and the rights are now vested in the Crown in right of the Crown. As to the transference of palatine rights generally, see p. 216, *post.*

(*d*) See the text *infra.*

(*e*) As to the Bishop of Durham, also any right, title, or interest vested in him at the passing of the Durham County Palatine Act, 1836 (21st June, 1836).

(*f*) Durham County Palatine Act, 1858 (21 & 22 Vict. c. 45), s. 2. "County of Durham" comprises the county of Durham and Sadberge, including the detached parts of Craikshire, Bedlingtonshire, Norhamshire, Allertonshire, and Islandshire, and all other places formerly within the jurisdiction of the Bishop of Durham in right of the county palatine (*ibid.*, s. 1; Durham County Palatine Act, 1836 (6 & 7 Will. 4, c. 19), s. 7).

(*g*) Now the Paymaster-General (see title REVENUE).

(*h*) Durham County Palatine Act, 1858 (21 & 22 Vict. c. 45), s. 2.

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of the Ecclesiastical Commissioners, in or to any land reclaimed from the flow of the tide in any navigable river or upon the shore of the sea within the county of Durham, from which the said Bishop had previously to the 21st June, 1836, actually received rent after the same had been reclaimed. All such reclaimed land is deemed to be parcel of the possessions formerly belonging to the see of Durham, and is now vested in the Ecclesiastical Commissioners (*i*).

Existing leases.

210. The transfer was made subject to any then existing leases affecting the lands transferred (*k*). On the determination of any such lease which includes property belonging to the Crown (*l*), such property is to become subject to the Acts regulating the management of Crown lands; and the counterparts of all leases of any hereditaments of which the whole rents were, by the Durham County Palatine Act, 1858, directed to be paid to the Commissioners of Woods, were directed to be delivered up to the Commissioners of Woods immediately after the 23rd July, 1858; and as to leases under which the whole or a portion of the rents and profits were directed to be paid to the Commissioners of Woods, counterparts were directed to be made in the office of the Ecclesiastical Commissioners. The counterparts and copies to be so made and delivered to the Commissioners of Woods were directed to be enrolled in the office of Land Revenue Records and Enrolments, and the enrolment is admissible as evidence of the lease (*m*).

Application of rents and profits.

211. All rents, profits, and other moneys received by the Commissioners of Woods (*n*) from, and the proceeds of any sales or dispositions made by them or either of them, of any part of the bed or shores of any navigable river so far as the tide flows, or of the shores of the sea below high-water mark, or of any inclosures, embankments, and encroachments made therefrom or thereupon respectively within the county of Durham, after deducting all costs, charges, and expenses in any wise incidental to the sale, management, or recovery of such property, are to be divided into moieties, of which one moiety is to be applied by the Commissioners of Woods as part of the hereditary revenues of the Crown (*o*), and the other moiety is to be paid by the Commissioners of Woods to the Ecclesiastical Commissioners, but the latter are not, on account of such apportionment, to have any right to interfere with the management or disposition of the property (*a*).

(*i*) Durham County Palatine Act, 1858 (21 & 22 Vict. c. 45), s. 2.

(*k*) *Ibid.*, ss. 3, 4. Any rents thereunder are paid to the Commissioners of Woods on behalf of the Crown.

(*l*) Under the Durham County Palatine Act, 1858 (21 & 22 Vict. c. 45), or otherwise.

(*m*) Durham County Palatine Act, 1858 (21 & 22 Vict. c. 45), s. 3.

(*n*) Under the Durham County Palatine Act, 1858 (21 & 22 Vict. c. 45), or otherwise.

(*o*) In the manner directed by the Crown Lands Act, 1829 (10 Geo. 4, c. 50); see p. 127, *post*.

(*a*) Durham County Palatine Act, 1858 (21 & 22 Vict. c. 45), s. 4. Such property is to be managed as part of the hereditary possessions of the Crown as if no such provision as to apportionment had been made (*ibid.*). The Act also

SECT. 2.

(3) *Land formed by Alluvion and Diluvion.*

Surrendered Revenues arising from Crown Lands.

Alluvion.

212. Where land is formed by alluvion, that is, by the casting up of earth or sand on the shore of the sea, the additional increment belongs to the Crown where the casting up of the earth or sand takes place suddenly (*b*). But where new land is formed by small accretions, and the additions or increments are so gradual as to be inappreciable, these belong to the owner of the adjacent land (*c*), whether the accretions are due to natural or to artificial causes, provided in the latter case the user of the land be lawful (*d*).

Diluvion.

213. The Crown is also entitled to land suddenly left bare by diluvion, or the reflux or dereliction of the sea, or of a river as far as the sea flows (*e*), and to islands arising in the narrow seas or arms of the sea, and in rivers as far up as the tide flows and reflows (*f*). But where the diluvion or dereliction takes place gradually, the land left bare belongs to the adjacent owner (*g*); and where the soil of the creek or river belongs to a subject by grant or prescription (*h*) new islands formed therein or land left bare by diluvion belong to the latter (*i*). Nor is the Crown entitled, it seems, where the owner of land left bare, which was formerly covered, can recognise any portion which belonged to him (*k*), nor where land is left bare, or new islands arise, in rivers in which there is no tide, in both of which cases the land belongs to the riparian owner or owners (*l*).

(4) *Royal Mines.*

Gold and silver mines.

214. By prerogative right the Crown is entitled to all mines of gold and silver within the realm, whether such mines are situate in its own lands or in the lands of a subject (*m*).

contains a saving of the rights of all persons, bodies politic and corporate etc. (other than in the cases provided for or intended to be provided for by the Act), enjoyed by them before the 23rd July, 1858, or which they could or might have enjoyed if the Act had not been passed (*ibid.*, s. 6).

(*b*) Hale, De Jure Maris, Hargrave, Law Tracts, p. 14; 2 Bl. Com., 14th ed., 262. But see *Anon.* (1573), 3 Dyer, 326 b.

(*c*) Hale, De Jure Maris, *supra*; Bl. Com., *supra*; *R.* v. *Yarborough* (*Lord*) (1828), 2 Bli. (N. S.) 147, H. L.; *Doe* d. *Seebkristo* v. *East India Co.* (1856), 10 Moo. P. C. C. 140.

(*d*) *A.-G.* v. *Chambers* (1859), 4 De G. & J. 55. Where the artificial causes are intended to produce the accretion, the Crown would, it seems, be entitled (*ibid.*).

(*e*) Hale, De Jure Maris, *supra*; 2 Roll. Abr. 169, pl. 11; and see *Anon.* (1573), *supra*; 2 Bl. Com., 14th ed., 262.

(*f*) Hale, De Jure Maris, *supra*, 17.

(*g*) Bl. Com., *supra*. As to whether the Crown can grant lands under the sea which subsequently become derelict, see *A.-G.* v. *Turner* (1676), 2 Mod. Rep. 106.

(*h*) The soil of creeks and tidal rivers may be vested in a subject either by charter or prescription, and either in gross or as parcel of a manor (see *Constable's Case* (1601), 5 Co. Rep. 105 b, 107 a; *Anon.* (1573), *supra*.

(*i*) Hale, De Jure Maris, Hargrave, Law Tracts, pp. 26, 36.

(*k*) *Barrington's* (*Sir Francis*) *Case* (1610), 8 Co. Rep. 136 b; but see *A.-G.* v. *Chamberlaine* (1858), 4 K. & J. 292.

(*l*) 2 Roll. Abr. 170, pl. 15; 2 Bl. Com., 14th ed., 261. As to the rights of riparian owners in such cases, see titles REAL PROPERTY AND CHATTELS REAL; WATERS AND WATERCOURSES.

(*m*) *Case of Mines* (1568), 1 Plowd. 310, 315, 316, Ex. Ch.; Bac. Abr. tit. Prerogative, B, 8; 1 Bl. Com., 14th ed., 294. This prerogative is said to owe

This right, however, does not (since the year 1688 (*n*)) extend to mines of copper, tin, iron, or lead, which are not to be adjudged, taken, or reputed to be royal mines although gold or silver may be extracted therefrom (*o*); and British subjects (*p*), being owners or proprietors of any mine or mines within England, Wales, or the town of Berwick-upon-Tweed wherein any ore is or may be discovered, opened, found, or wrought, and in which there is copper, tin, iron, or lead, may hold, enjoy, and possess such mines and ore, and dig and work the same, notwithstanding that they are pretended or claimed to be royal mines, any law, usage, or custom to the contrary notwithstanding (*q*).

Mines of base metal.

215. These provisions do not, however, extend to mines worked primarily for gold, where the ore contains such a slight admixture of the baser metals as to be valueless in itself for purposes of working (*r*); and the Crown or any person claiming under it may have the ore of any such mine or mines in any part of England, Wales, or the town of Berwick-upon-Tweed (other than tin ore in the counties of Devon and Cornwall) upon paying the proprietors of the mine (within thirty days after the ore is raised and laid upon the bank of the mine and made clean and merchantable (*s*), and before it is removed), for all such ore made clean and merchantable, at the rate of £16 per ton for ore containing copper, £2 per ton for ore containing tin or iron, and £25 per ton for ore containing lead (*t*). In default of payment of such respective sums the owners or proprietors of the mine may sell and dispose of the ore to their own use (*u*).

Right of Crown to claim ores upon payment.

But these provisions do not alter, determine, or make void the charters granted to the tinners of Devon and Cornwall by the Crown, or any of their liberties, privileges, or franchises, or the laws, customs, or constitutions of the stannaries of Devon or Cornwall (*a*).

Saving for the stannaries.

216. The Crown may grant the right to royal mines in the form of a franchise; but, unless expressly mentioned in the grant, royal mines will not pass (*b*).

Grant of royal mines.

its origin to the King's need of supplies for war and the coinage (*Case of Mines, supra*; 1 Bl. Com., 14th ed., 294). Mines of gold and silver in the county palatine of Durham were revested in the Crown by the Durham County Palatine Acts, 1836 (6 & 7 Will. 4, c. 19) and 1858 (21 & 22 Vict. c. 45) (see p. 114, *ante*). As to mines generally, see title MINES, MINERALS AND QUARRIES.

(*n*) Before that year the right of the Crown at common law extended to all mines of baser metal which contained any gold or silver, irrespective of the proportionate value of the ores (*Case of Mines* (1568), 1 Plowd. 310, 315, 336, 339, Ex. Ch.; Bac. Abr. tit. Prerogative, B, 8).

(*o*) Statute 1 Will. & Mar. (sess. 1, Ruff.), c. 30, s. 3.

(*p*) Including bodies politic or corporate.

(*q*) Statute 5 Will. & Mar. c. 6, s. 1.

(*r*) *A.-G.* v. *Morgan*, [1891] 1 Ch. 432, C. A. A licence from the Crown is required in such cases (*ibid.*).

(*s*) Statute 5 Will. & Mar. c. 6, s. 2; *A.-G.* v. *Morgan*, *supra*.

(*t*) Statute 5 Will. & Mar. c. 6, s. 2, amended as to lead ore by the Crown Preemption of Lead Ore Act, 1815 (55 Geo. 3, c. 134), s. 1.

(*u*) *Ibid.*, s. 2.

(*a*) *Ibid.*, s. 3.

(*b*) *Case of Mines, supra*. As to when royal mines pass under a general grant, see Vol. VI., p. 479.

SECT. 2. Surrendered Revenues arising from Crown Lands.

Mines under foreshore.

217. As general owner of the foreshore (except in Cornwall (*c*)), the Crown enjoys the right to mines thereunder, unless where granted away or otherwise alienated (*d*). This right extends in Scotland to all mines underlying the waters of the ocean, whether within the narrow seas or from the coast outward to the three-mile limit (*e*), and the same principle would, it seems, be applicable elsewhere in Great Britain (*f*). The right to work such mines, in so far as it does not interfere with public rights of navigation or other public rights, may be granted by the Crown (*g*).

Digging for saltpetre.

218. The Crown by prerogative right is entitled to dig for saltpetre in the lands of a subject (*h*). But this right, being allowed to the Crown originally for the defence of the realm in connection with the making of gunpowder, cannot be granted away, demised, or transferred (*i*).

The right is also subject to certain rules for the protection of the owner of the soil. Thus, the Crown may not dig in a man's house, barn, or outhouse, or so as to weaken the walls, and the soil must be left as commodious as it was before. Nor can the Crown restrain the owner of the soil from digging for saltpetre himself (*k*).

SUB-SECT. 2.—*Exemption of Crown Property from Taxation.*

Taxation of Crown property.

219. The Crown not being bound by any statute whereby any prerogative right, title, or interest belonging to it may be divested or abridged, unless expressly named (*l*) or bound by clear implication (*m*), property owned and occupied by the Crown is exempt from taxation unless rendered liable either by express

(*c*) Where the foreshore belongs, *primâ facie*, to the Duke of Cornwall (see p. 113, *ante*). As to the division of mining rights under the foreshore between the Crown and the Duke of Cornwall, see p. 258, *post*.

(*d*) As to the Crown's right to the foreshore generally, see p. 112, *ante*. The management of mines under the foreshore remains with the Commissioners of Woods (see Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 21, and p. 143, *post*). As to when coal mines under the foreshore pass under a grant of coal mines, see Vol. VI., p. 479, note (*o*). Under a grant of "mines" simply, mines of gold and silver do not pass (see Vol. VI., p. 479, *ante*).

(*e*) *Lord Advocate* v. *Wemyss*, [1900] A. C. 48, H. L., *per* Lord WATSON, at p. 66.

(*f*) See the statutory provisions relating to mines under the foreshore in Cornwall, p. 258, *post*.

(*g*) *Lord Advocate* v. *Wemyss*, *supra*. The power to grant the soil itself seems doubtful (*ibid.*).

(*h*) *Case of Saltpetre* (1606), 12 Co. Rep. 12.

(*i*) *Ibid.* 13.

(*k*) *Ibid.* 12—14.

(*l*) *Magdalen College Case* (1616), 11 Co. Rep. 66 b, 68 b, 74 b; *R.* v. *Cook* (1790), 3 Term Rep. 519, 522; Bac. Abr. tit. Prerogative, E, 5; Vin. Abr. tit. Statutes, E, 10; 2 Hawk. P. C., c. 42, s. 3; *Re Bonham, Ex parte Postmaster-General* (1879), 10 Ch. D. 595, 601; *Perry* v. *Eames*, [1891] 1 Ch. 658, 668, approved *Wheaton* v. *Maple & Co.*, [1893] 3 Ch. 48, C. A. As to exemption from a local public Act, see *Lord Advocate* v. *Lang* (1866), 5 Macph. (Ct. of Sess.) 84. As to the Metropolis Building Act, 1855 (18 & 19 Vict. c. 122), repealed by the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), see *Jay* v. *Hammon* (1857), 27 L. J. (M. C.) 25. See also generally title STATUTES.

(*m*) *Hornsey Urban District Council* v. *Hennell*, [1902] 2 K. B. 73, 80 (the Crown is not bound by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150).

words or necessary implication (*n*). Moreover, an express exemption of particular classes of Crown property in a statute is not in itself sufficient to raise the implication that such property only is exempt, and that other property not falling within the exception is bound, such clauses being inserted merely *ex majori cautelâ* (*o*).

A general clause in an Act of Parliament saving the rights of the Crown will not suffice, it seems, to preserve the rights of the Crown, if repugnant to the body of the Act, at any rate when rights shared by the Crown in common with the public are concerned (*p*). And when rights of property vested in the Crown are in question, a saving clause would not, it is apprehended, be sufficient to preserve them, if repugnant to the body of the Act (*q*). This doctrine has, however, been doubted (*r*), and the question must, it seems, be governed by the particular circumstances and the extent of the repugnancy.

Property occupied for Crown purposes.

220. Where the tax falls upon the occupier, as in the case of poor rates (*s*), Crown property falls within the exemption where it is occupied by the Crown, or by servants of the Crown for the purposes of the Crown (*t*), and also where it is occupied by bare trustees for public purposes, such as are required and created by the Government of the country, and, therefore, are to be deemed part of the use and service of the Crown (*a*) ; and in such cases the legal ownership may be vested in such trustees, and not in the Crown (*b*).

(*n*) *Hornsey Urban District Council* v. *Hennell*, [1902] 2 K. B. 73, 80.

(*o*) *Ibid.* 80, 81 ; *Smithett* v. *Blythe* (1830), 1 B. & Ad. 509; *Weymouth Corporation* v. *Nugent* (1865), 6 B. & S. 22.

(*p*) *Yarmouth Corporation* v. *Simmons* (1878), 10 Ch. D. 518, 527, 528, where a general saving clause was held not to preserve a public right of way. A saving clause in a statute generally is void if repugnant to the body of the Act (*Alton Woods' Case* (1600), 1 Co. Rep. 40 b; see also *A.-G.* v. *Great Eastern Rail. Co.* (1873), L. R. 6 H. L. 367). *Quære* whether a general clause saving the rights of the Crown refers to rights of property or in the nature of property only (*Yarmouth Corporation* v. *Simmons*, *supra*, *per* FRY, J., at p. 528).

(*q*) *Alton Woods' Case* (1600), 1 Co. Rep. 80 b.

(*r*) *Simpson* v. *Scales* (1801), 2 Bos. & P. 496, *per* ROOKE, J., at p. 499. In this case a towing path forming part of the soil of a navigable river was in question, and ROOKE, J., expressed the opinion that, supposing the towing path could be considered as falling within the words of the Act, he would still be inclined to hold that the right was saved by the exception in favour of the King, who is the protector of all these public rights. See also, generally, title STATUTES.

(*s*) As to rates generally, see title RATES AND RATING.

(*t*) *Mersey Docks and Harbour Board Trustees* v. *Cameron* (1865), 11 H. L. Cas. 443, *per* Lord CRANWORTH, at p. 508. This principle exempts from rates royal palaces, offices of the Secretaries of State, the Post Office etc. (*ibid.*). See also *Smith* v. *Birmingham Guardians* (1857), 7 E. & B. 483 (post-office); *Amherst* (*Lord*) v. *Somers* (*Lord*) (1788), 2 Term Rep. 372 (stables rented by the colonel of a regiment under the authority of the Crown for purposes of the regiment); *R.* v. *Stewart* (1857), 8 E. & B. 360 (Admiralty).

(*a*) *Mersey Docks and Harbour Board Trustees* v. *Cameron*, *supra*, *per* Lord WESTBURY, L.C., at p. 505. See also *Pearson* v. *Holborn Union Assessment Committee*, [1893] 1 Q. B. 389; *Coomber* v. *Berks Justices* (1883), 9 App. Cas. 61, 75, 76; *Amherst* (*Lord*) v. *Somers* (*Lord*), *supra*.

(*b*) *Pearson* v. *Holborn Union Assessment Committee*, *supra*; *Coomber* v. *Berks Justices*, *supra*; *Amherst* (*Lord*) v. *Somers* (*Lord*), *supra*. See also *Perry* v. *Eames*, [1891] 1 Ch. 658, 668.

SECT. 2. Surrendered Revenues arising from Crown Lands.

Thus, stables rented by the colonel of a regiment by order of the Crown for the use of the regiment, and used exclusively for such purpose (*c*), and premises rented and occupied by the commanding officer of a territorial battalion, and used as a storehouse for the service of the corps, and including portions used as a mess-room, ante-room, canteen etc. (*d*), are not liable to rates, and assize courts or police stations vested in justices are not liable to income tax (*e*); and many other instances could be given (*f*).

When liable.

221. But lands, tenements, and hereditaments of the Sovereign are expressly made liable to all rates and taxes imposed by the Commissioners of Sewers, where appointed by the Crown, or by the Crown on the recommendation of the Board of Agriculture and Fisheries, on the application of one tenth part of the proprietors of the area affected (*g*).

Moreover, the above classes of property will not be exempt if the profits of the occupation are to be devoted simply to the benefit of the public apart from Government purposes (*h*). Thus, property vested in trustees to create and improve docks and harbours (*i*), or premises occupied as a reformatory school under a statutory certificate (*k*), and industrial schools (*l*), are liable to poor rate.

(*c*) *Amherst* (*Lord*) v. *Somers* (*Lord*) (1788), 2 Term Rep. 372.

(*d*) *Pearson* v. *Holborn Union Assessment Committee*, [1893] 1 Q. B. 389. Storehouses acquired by the commanding officer of a volunteer corps for the storage of arms etc. supplied at the public expense or by subscription, with the approval of the lieutenant of the county, were also expressly exempted from all county, parochial, or other local rates and assessments (Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 26, extended to the Royal Naval Volunteer Reserve by the Naval Forces Act, 1903 (3 Edw. 7, c. 6), s. 1 (2) (ii.)).

(*e*) *Coomber* v. *Berks Justices* (1883), 9 App. Cas. 61.

(*f*) *Lancashire Justices* v. *Stretford Overseers* (1858), E. B. & E. 225 (occupation by local police); *Hodgson* v. *Carlisle Local Board of Health* (1857), 8 E. & B. 116 (assize courts and judges' lodgings); *R.* v. *Manchester Overseers* (1854), 3 E. & B. 336 (county courts); *R.* v. *Shepherd* (1841) 1 Q. B. 170 (gaols).

(*g*) Statutes 23 Hen. 8, c. 5; 3 & 4 Edw. 6, c. 8; Land Drainage Act, 1861 (24 & 25 Vict. c. 133), ss. 4, 5; Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2 (1) (*b*), Sched. I., Part II. By the statute 3 & 4 Edw. 6, c. 8, s. 2, all scot and lot and sums of money rated and taxed by the commissioners of sewers appointed under the above Acts upon any lands, tenements, or hereditaments of the Sovereign or his successors for any manner of thing concerning the articles of the commissioners are to be gathered and levied by distress or otherwise in like manner and form as may be done in the case of any other person. Acquittances under the hand or hands of collectors appointed by the commissioners are to be a sufficient discharge to the tenants or occupiers for the sums charged, as also a sufficient warrant to the receivers or other officers of the Crown for the allowance to such tenant or occupier for the same. See, generally, titles PUBLIC HEALTH ETC.; SEWERS AND DRAINS.

(*h*) *Mersey Docks and Harbour Board Trustees* v. *Cameron* (1865), 11 H. L. Cas. 443, *per* Lord CRANWORTH, at p. 507.

(*i*) *Ibid.*, overruling *R.* v. *Salter's Load Sluice Commissioners* (1792), 4 Term Rep. 730, and *R.* v. *Liverpool* (*Inhabitants*) (1827), 7 B. & C. 61. See also *Clyde Navigation Trustees* v. *Adamson* (1865), 4 Macq. 931, H. L.; *Leith Harbour and Docks Commissioners* v. *Inspector of Poor* (1866), L. R. 1 Sc. & Div. 17; *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee*, [1901] A. C. 175.

(*k*) *Tunnicliffe* v. *Birkdale Overseers* (1887), 19 Q. B. D. 280, *per* DAY, J., at p. 282; (1888), 20 Q. B. D. 450, C. A.

(*l*) *R.* v. *West Derby Overseers* (1875), L. R. 10 Q. B. 283; but see *per contra*

Where Crown property is let to an ordinary tenant at a rent (*m*), or assigned gratuitously to a subject who occupies it for his own benefit with the permission of the Crown (*n*), the occupier is liable to poor rate.

Moreover, the exemption does not apply to such portions of the premises as are not reasonably necessary for the service of the Crown, if the occupiers are in occupation thereof otherwise than merely as servants of the Crown. Any such excess is rateable (*o*), unless it is of a trifling nature, when it will, it seems, be disregarded (*p*).

When owner liable.

222. Where the tax falls upon the owner and not upon the occupier the principle of exemption is the same (*q*), and applies equally to a legal interest vested in, or a beneficial ownership by, the Crown (*r*). Thus, the commanding officer of a volunteer corps in whom property is vested for the military purposes of the corps is not liable for an amount apportioned in respect of the premises for renewing and paving (*s*).

Crown private estates.

223. Statutory private estates of the Crown are rendered subject to taxation by statute (*a*). But private property of the Crown not expressly so bound is exempt from general statutory provisions, such property being affected at common law with the incidents and privileges of the prerogative (*b*).

Sheppard v. *Bradford Overseers* (1864), 16 C. B. (N. S.) 369; *Tunnicliffe* v. *Birkdale Overseers* (1887, 19 Q. B. D. 280; (1888), 20 Q. B. D. 450, C. A.

(*m*) *Mersey Docks and Harbour Board Trustees* v. *Cameron* (1865), 11 H. L. Cas. 443, opinion of the majority of the judges at p. 463.

(*n*) *Ibid.*, at p. 464; *R.* v. *Ponsonby* (*Lady*) (1842), 3 Q. B. 14 (property forming part of an ancient palace, namely, Hampton Court, no longer used as a Crown residence); *R.* v. *Hurdis* (1789), 3 Term Rep. 497 (lodging in a battery occupied by a gunner removable at pleasure).

(*o*) *Pearson* v. *Holborn Union Assessment Committee*, [1893] 1 Q. B. 389, *per* COLLINS, J., at p. 396; *R.* v. *Stewart* (1857), 8 E. & B. 360; *R.* v. *Fuller* (1855), 8 E. & B. 365, n.; *R.* v. *Hurdis*, *supra*; *R.* v. *Terrott*, (1803), 3 East, 506; *R.* v. *Ponsonby* (*Lady*), *supra*; *Gambier* v. *Lydford Overseers* (1854), 3 E. & B. 346; *Martin* v. *West Derby Assessment Committee* (1883), 11 Q. B. D. 145, C. A.; *Tunnicliffe* v. *Birkdale Overseers*, *supra*.

(*p*) *R.* v. *Stewart*, *supra*.

(*q*) *Coomber* v. *Berks* (*Justices*) (1883), 9 App. Cas. 61, 75, 76.

(*r*) *Perry* v. *Eames*, [1891] 1 Ch. 658, 668, 669; *Mersey Docks and Harbour Board Trustees* v. *Cameron*, *supra*, *per* Lord CRANWORTH, at p. 508.

(*s*) *Hornsey Urban District Council* v. *Hennell*, [1902] 2 K. B. 73. As to the maintenance of a foot pavement by the Crown under a local Act, see *Lord Advocate* v. *Lang* (1866), 5 Macph. (Ct. of Sess.) 84. But see note (*g*), p. 120, *ante*, as to rates imposed by the Commissioners of Sewers under the statutes 23 Hen. 8, c. 5; 3 & 4 Edw. 6, c. 8.

(*a*) Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), ss. 8, 9; and see p. 276, *post*.

(*b*) See p. 273, *post*. In *Westover* v. *Perkins* (1859), 2 E. & E. 57, a carriage and horses belonging to the Queen used by a member of her household with her permission and driven by her coachman, but not upon her service, was held exempt from turnpike tolls, and the same principle would apply in an appropriato case to other statutory impositions.

SECT. 2. Surrendered Revenues arising from Crown Lands.

SUB-SECT. 3.—*General Management of Crown Lands.*

(1) *The Department of Woods, Forests, and Land Revenues.*

The Commissioners of Woods.

224. The Commissioners of His Majesty's Woods, Forests, and Land Revenues, to whom (with some exceptions) the general management of the land revenues of the Crown is intrusted, comprise two permanent Commissioners who are appointed by royal warrant under the sign manual, and hold office during the pleasure of the Crown (*c*), together with the President of the Board of Agriculture and Fisheries, who since the 4th August, 1906, has become a Commissioner of Woods by virtue of his office (*d*).

The permanent Commissioners are incapable of being elected or of voting as members of the House of Commons (*e*); but the President of the Board of Agriculture and Fisheries is not subject to the same incapacity (*f*), and is usually a member of the Cabinet (*g*).

Validity of Commissioners' acts.

225. Acts done by one of the Commissioners are, in the absence of express provision to the contrary, as valid and effectual as if done by all of them (*h*), and the Treasury may from time to time, by order under their hands, assign to each of the Commissioners the management or direction of or relating to any

(*c*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 1. Under this section the First Commissioner of Woods appointed under the Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1), ss. 1, 2, became the First Commissioner of Works and Public Buildings. Salaries of £1,200 per annum, clear of all fees and deductions, may be granted by the Crown to the two permanent Commissioners, and these, together with the salaries of the various officers, clerks, and messengers of the department (which are such as the Treasury may direct), are defrayed out of moneys voted annually by Parliament (Crown Lands Acts, 1829 (10 Geo. 4, c. 50), ss. 11, 12; 1851 (14 & 15 Vict. c. 42), s. 4). The salaries of the Commissioners are directed to be paid by four equal quarterly instalments. The President of the Board of Agriculture and Fisheries receives no additional salary in his capacity of Commissioner of Woods (Crown Lands Act, 1906 (6 Edw. 7, c. 28), s. 1). The Commissioners were originally called Commissioners of Woods, Forests, and Land Revenues, but by s. 2 of the Crown Lands Act, 1885 (48 & 49 Vict. c. 79), they may be referred to as Commissioners of Woods, and, by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12 (12), under that name or as Commissioners of Woods and Forests.

(*d*) Crown Lands Act, 1906 (6 Edw. 7, c. 28), s. 1. Under the Crown Lands Act, 1851 (14 & 15 Vict. c. 42), ss. 11—14, powers of changing the management of the Crown lands (which have not at present been exercised) are conferred upon the Crown as follows:—At any time the Crown by Order in Council may direct that the woods, forests, and land revenues shall be under the management of a surveyor-general, who is to be appointed by sign manual warrant during pleasure at such salary not exceeding £1,500 as the Treasury may appoint. From and after such appointment, the appointment of the Commissioners of Woods is to cease, and all duties, powers, rights, privileges, hereditaments, properties, and exemptions of the latter are to pass to the surveyor-general, who is to stand in their place as to all statutes, deeds, bonds, contracts, agreements, and other instruments in which they are mentioned. After the appointment of the surveyor-general, the Treasury may appoint a person, being by education and profession a land surveyor, to be an itinerant surveyor of Crown lands and land revenues, his duties, under the control and direction of the surveyor-general, and salary being regulated by the Treasury, by whom he is to be removable.

(*e*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 10.

(*f*) Crown Lands Act, 1906 (6 Edw. 7, c. 28), s. 1.

(*g*) See p. 37, *ante*.

(*h*) Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1), s. 10.

separate part or parts of the woods, forests, and land revenues, and any of the powers or duties which would otherwise be exercisable jointly. Acts in relation to the management or direction, duties, or powers so assigned are to be as valid and effectual as if done by all Commissioners, and each is to be responsible only for his own acts; and no person claiming under any deed or instrument purporting to be made by one Commissioner under this authority is bound to inquire whether the latter was duly authorised by order as above. Every deed or instrument purporting to be made by one Commissioner under the authority of the Crown Lands Act, 1851, is, after the same has been duly enrolled, valid and effectual as against the Crown for the purposes for which it was executed (*i*).

Officers.

226. Officers in the departments of or under the control and direction of the Commissioners of Woods, Forests, and Land Revenues, on the 1st August, 1851, were directed to be in the department or under the control and direction of, and removable by, the Commissioners of Woods, and all officers to be appointed after that date are to be appointed by the Treasury, subject to removal by the Commissioners of Woods (*k*).

The Treasury may also abolish or reduce any office in the department under the control and direction of the Commissioners of Woods, or any office connected with the management of the land revenues of the Crown, or the collection and receipt of the income thereof, making such compensation as they may deem reasonable, reference being had to the provisions of the Superannuation Act, 1834 (*l*), in so far as it relates to rates of grants and periods of

(*i*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 5. A vacancy in the office of the Commissioners of Woods does not invalidate an order so made as to the other Commissioners, or prevent the Treasury from making an order (Crown Lands Act, 1894 (57 & 58 Vict. c. 43), s. 9). Such order is to be effectual as to any duties under the Crown Lands Act, 1885, or any other Act (Crown Lands Act, 1885 (48 & 49 Vict. c. 79), s. 5).

(*k*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 7. Under this Act the departments of Woods and Forests and of Works and Public Buildings were separated, the First Commissioner of Woods becoming First Commissioner of Works and Public Buildings (*ibid.*, ss. 1, 15). The power of appointing officers conferred upon the Treasury apparently supersedes the powers of the Commissioners of Woods to appoint deputies, clerks, receivers, surveyors, and other officers conferred by the Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 12. By s. 13 of the latter Act the Commissioners of Woods were also empowered to appoint stewards of any hundreds, honours, manors, or lordships, being part of the possessions and land revenues of the Crown under the Act, with power and authority to hold and keep hundred courts, courts leet, views of frank-pledge, courts baron, customary, and other courts, and to perform all the duties of such offices; also to appoint persons to execute all customary forestal offices, and to preserve the deer and other game and fish within the Crown lands to which the Act relates; also to grant licences to hunt, fish, and kill game, seize and destroy unlawful dogs, nets, etc., and generally to act as stewards and gamekeepers. Under the Crown Lands Act, 1852 (15 & 16 Vict. c. 62), s. 1, the Treasury Commissioners are authorised, by order under the hands of two of them, to appoint to the office of gaveller of the Forest of Dean and conservator of the river Mersey, and to any other office whatsoever, in pursuance of the powers conferred by the Crown Lands Act, 1851 (14 & 15 Vict. c. 42), thus setting at rest all doubts as to the validity of such appointments.

(*l*) 4 & 5 Will. 4, c. 24.

SECT. 2. Surrendered Revenues arising from Crown Lands.

service (*m*). They may also make any arrangement in relation to any such office, or the performance of the duties of the same, which may appear expedient (*n*).

Persons appointed under the above powers must take the oath of office in the form prescribed (*o*) (or make a declaration in lieu of the oath (*p*)), which is to be administered by one or more of the Commissioners of Woods, or, if the latter so direct, by any justice of the peace or magistrate (*q*).

Receivers.

227. A person appointed receiver of the issues, revenues, and profits of Crown lands (*r*) for any county, hundred, district, or division in England or Wales (except London or Middlesex) must comply with the prescribed conditions as to qualification and residence (*a*); and upon ceasing to comply with the conditions as to residence his appointment is void, without prejudice, however, to any person by whom money may have been paid to such receiver *bonâ fide* without actual knowledge of the appointment having ceased. Receivers must also, before exercising their office, enter into such bond or obligation, in such penalty and with such sureties, as the Commissioners of Woods require, for the faithful performance of their duties (*b*).

(2) *General Powers of the Treasury.*

Treasury control.

228. Both the Commissioners of Works and the Commissioners of Woods must observe the orders and directions of the Treasury concerning their respective duties and offices, and for the effectual division, distribution, and arrangement of their duties and powers, in so far as such orders are not inconsistent with the statutory provisions in force (*c*).

Transfer of powers.

229. The Treasury may, by order under their hands, transfer from the Commissioners of Woods to the Commissioners of Works any of the powers and duties formerly vested in the Commissioners of Woods, Forests, Land Revenues, Works, and Buildings (*d*) under

(*m*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 8.

(*n*) *Ibid.*

(*o*) By the Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 13.

(*p*) Under the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s, 12 (see p. 26, *ante*), or under the Statutory Declarations Act, 1835 (5 & 6 Will. 4, c. 62) (see note (*h*), p. 27, *ante*).

(*q*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 13.

(*r*) To which the Crown Lands Act, 1829 (10 Geo. 4, c. 50), applies; see p. 151, *post*.

(*a*) Namely, he must be by profession a surveyor of lands or land steward, and accustomed to act as such, or be otherwise skilled in the management and cultivation of lands, and competent to superintend the same. He must also be resident within the county, hundred, district, or division for which he is appointed, unless the Commissioners of Woods dispense with such residence (*ibid.*, s. 80).

(*b*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 85. Such bonds are to have the effect of a statute staple to the Crown for the payment of all sums payable thereunder, and are to be enrolled in the office of the Auditor of Land Revenues [now superseded by the Comptroller and Auditor-General] and deposited and kept in the Office of Woods (*ibid.*).

(*c*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), ss. 32, 33.

(*d*) As to the separation of the departments, see note (*k*), p. 123, *ante*.

any local or personal Act, and transferred to the Commissioners of Woods under the Crown Lands Act, 1851; but no such order is to be made unless authorised by royal warrant under the sign manual (*e*).

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230. The Treasury are also empowered to make rules and regulations, general or special, with regard to the receipt and payment of moneys, the persons to be employed in relation thereto, the form and place in which accounts are to be kept, and generally with regard to the manner in which the financial transactions of both departments are to be conducted, or as to the collection and receipt of the land revenues and payments thereout to the Exchequer. They may also appoint any officers required for the collection and receipt of such revenues, or for keeping accounts or rendering the same for audit to the Comptroller and Auditor-General (*f*).

Rules and regulations.

(3) *General Powers of the Commissioners of Woods.*

231. With the exception of the powers and duties exercisable by the Commissioners of Works (*g*) or the Board of Trade (*h*), the general management of such of the possessions and land revenues of the Crown as have been surrendered to the nation is vested in the Commissioners of Woods (*i*). Such lands include all honours, hundreds, castles, lordships, manors, forests, chases, woods, parks, messuages, lands, tithes, fisheries, franchises, services, rents, and other land revenues, possessions, tenements, and hereditaments whatsoever (advowsons of churches and vicarages only excepted) as belong to the Crown and fell within the survey of the former Court of Exchequer in England or Wales, Ireland, the Isle of Man and its dependencies, and the Isle of Alderney, whether in possession, remainder, or reversion (*k*), and also the land revenues, lands, teinds, feu, retour, and other duties and casualties of the Crown in Scotland (*l*), except, as to these latter, the rights and interests of the Crown (in right of the Crown) as *ultimus hæres*, or in cases of bastardy, or by reason of any forfeiture whatsoever, the management of which is vested in the Treasury (*m*).

Powers of Commissioners of Woods.

232. The Commissioners of Woods are directed to keep an account with the Bank of England entitled the "Woods and Forests

Banking accounts.

(*e*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 34.

(*f*) Crown Lands Acts, 1848 and 1851 (11 & 12 Vict. c. 102, ss. 9, 10; 14 & 15 Vict. c. 42, ss. 35, 36).

(*g*) See pp. 132 *et seq.*, *post*.

(*h*) See pp. 142 *et seq.*, *post*.

(*i*) See pp. 109 *et seq.*, *ante*.

(*k*) Crown Lands Acts, 1829 (10 Geo. 4, c. 50), s. 8, and 1851 (14 & 15 Vict. c. 42), ss. 1, 2.

(*l*) Crown Lands (Scotland) Act, 1833 (3 & 4 Will. 4, c. 69), s. 2.

(*m*) Crown Lands (Scotland) Act, 1835 (5 & 6 Will. 4, c. 58), s. 1. The powers and authorities formerly exercised by the wardens, chief justice, and justices in eyre north and south of the Trent (whose offices were abolished on the termination of existing interests therein by statute 57 Geo. 3, c. 61) are vested in the Commissioners of Woods by the Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 95.

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Fund," and may, if they find it more convenient, keep any other distinct accounts with the said Bank (*n*). They may also, when they find it necessary, keep an account with the Bank of Ireland, or with any of the chartered banks in Scotland (*o*); and, so long as they observe the rules and regulations prescribed (*p*), they are not answerable either collectively or individually for any money so paid into such banks, or into any branch of the chartered banks in Scotland (*q*).

They are directed to pay all money, bills, and drafts received by them, their agents, or receivers, either on account of annual income, or for fines, leases, sales, or exchanges, of the possessions and land revenues of the Crown in England, Wales, Scotland, Ireland, the Isle of Man and its dependencies, and the Isle of Alderney, as soon as conveniently may be into the Banks of England or Ireland, or the chartered banks of Scotland (*r*); and all moneys, bills, and drafts received on any of the above accounts at their public office in London are directed to be paid into the Bank of England within one day after receipt thereof, or after any such bill or draft is accepted, completed, and perfected (*s*).

The Commissioners of Woods are, however, empowered to reserve out of such moneys, and place in the hands of any private banker, a sum not exceeding £3,000 for casual and ordinary payments, and to make up the same to that sum from time to time by drafts upon the Bank of England. This sum may be drawn upon by the Commissioners, or any two of them, as occasion requires (*t*).

Forgery of documents.

233. It is felony for any person or persons knowingly and wilfully to forge or counterfeit, or to act or assist in forging or

(*n*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 117.

(*o*) *Ibid.*; and as to Scotland, Crown Lands (Scotland) Act, 1833 (3 & 4 Will. 4, c. 69), s. 17.

(*p*) By the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and (*semble*) also by subsequent Acts, or by the Treasury (see as to the powers of the latter, p. 125, *ante*).

(*q*) See the references in note (*o*), *supra*.

(*r*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 118; Crown Lands (Scotland) Act, 1833 (3 & 4 Will. 4, c. 69), s. 3.

(*s*) *Ibid.* These moneys are to be placed to the accounts directed by the Commissioners, and the drafts or orders of the latter are to be sufficient authority to the banks to dispose of the moneys, bills, and drafts as directed by such drafts or orders (*ibid.*).

(*t*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 119; Crown Lands (Scotland) Act, 1833 (3 & 4 Will. 4, c. 69), s. 3. Provision is also made for making necessary payments by drafts under the hands of any two Commissioners for the transference of any sums from the accounts with the Bank of Ireland or the chartered banks in Scotland to the account with the Bank of England, on the death, resignation, or removal of any Commissioner or Commissioners, and for the vesting of the several balances at any of such banks in the surviving or newly-appointed Commissioners without assignment, transfer, or other act. But these, together with all other provisions as to the payment and receipt of money, must be read subject to the general powers of the Treasury to make rules and regulations in relation thereto (*ibid.*, ss. 120—123, and s. 3 respectively).

counterfeiting, the name or handwriting of the Treasury Commissioners, or any of them, to any power of attorney for the sale or transfer of any stock, or the name or handwriting of the Commissioners of Woods, or any of them, to any draft, instrument, or writing whatsoever, in order to receive or obtain any money in the hands of the Banks of England or Ireland, or the chartered banks of Scotland, or of any private banker, on account of the Commissioners of Woods; or to forge or counterfeit (or cause or procure, or knowingly and wilfully to act or assist in, the forging or counterfeiting) any draft instrument or writing in form of a draft made by the said Commissioners, or any of them, or to utter or publish any such knowing the same to be forged or counterfeited, with an intent to defraud any such bank or any body corporate or persons whomsoever (*a*).

Application of moneys.

234. All sums received under the authority of the Crown Lands Acts in respect of any sales or exchanges of the land revenues or possessions of the Crown (except sales or exchanges of royal forests (*b*)) are to be applied in the payment of the purchase-moneys of any lands or hereditaments purchased, or of leases of Crown lands bought in, or of moneys to be paid for equality of exchanges, under the authority of the Crown Lands Acts, and of the expenses of the Commissioners of Woods in relation to such purchases and exchanges (*c*); also in the payment of moneys for the redemption of land tax redeemed or purchased under the provisions of the Crown Lands Acts, and the expenses of the Commissioners in relation thereto (*d*); and also in the discharge of any incumbrances charged upon or affecting any of the land revenues or possessions of the Crown (*e*).

Sums received under the authority of the Crown Lands Acts in respect of sales, exchanges, or leases in any of the royal forests (*f*) are to be applied in the payment of the purchase-moneys of any rights of common, fuel, or other rights, lands, or hereditaments in the royal forests which may be purchased, and of moneys to be paid on exchanges in the royal forests which may be made, under the authority of the Crown Lands Acts (*g*), and of the expenses of the Commissioners in relation thereto; and also in the payment of any moneys agreed to be paid for the relinquishment of purprestures and encroachments in any of the royal forests (*h*). Subject to such applications, the moneys so received are to be applied in or towards maintaining the royal forests and the expenses attending management (*i*).

Charges on revenues.

The Treasury may, however, direct, if they think fit, that the costs,

(*a*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 124; as to Scotland, Crown Lands (Scotland) Act, 1833 (3 & 4 Will. 4, c. 69), s. 3.
(*b*) As to these, see the text, *infra*.
(*c*) As to sales and exchanges, see pp. 157 *et seq.*, 169 *et seq.*, *post*.
(*d*) As to redemption of land tax, see p. 178, *post*.
(*e*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 108.
(*f*) As to the powers of selling, leasing etc., see pp. 157 *et seq. post*.
(*g*) As to exchanges, see pp. 169 *et seq.*, *post*.
(*h*) As to relinquishment and purchase of such rights, see p. 187, *post*.
(*i*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 107.

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charges, and expenses connected with any operation, work, matter or thing coming within the description of the improvement of land contained in the Improvement of Land Act, 1864 (*k*), and the Settled Land Act, 1882 (*l*), and certain other improvements (*m*), effected or done in or with reference to any part of the possessions and land revenues of the Crown under the management of the Commissioners of Woods, shall be charged as a principal sum to the account of the capital of the land revenues of the Crown (*n*). The principal sum so charged is to be repaid out of the income of the land revenues of the Crown in the manner and at the times directed by the Treasury, so that provision be made for the complete repayment of principal out of income within a period not exceeding thirty years from the time when the principal sum became a charge as aforesaid (*o*).

Provision in case revenues are resumed by the Crown.

235. In the event of the annual produce of the land revenues and possessions of the Crown ceasing to be carried to the Consolidated Fund, and of their being retained by the Crown as part of its hereditary revenue, the same are to be charged and chargeable with the repayment into the Consolidated Fund of certain specified sums advanced out of the Consolidated Fund by way of loan (*a*), together with interest thereon at the rate of 4 per cent. per annum to be computed from the time of resumption by the Crown (*b*). The land revenues are to be applied in payment of these capital sums and interest prior to any other application thereof, except charges attending management of the land revenues, and the payment and discharge of any sums charged thereon under the Crown Lands Acts, and interest on so much of such sums as remains unpaid (*c*).

(*k*) 27 & 28 Vict. c. 114, s. 9, as extended by the Limited Owners Reservoirs and Water Supply Further Facilities Act, 1877 (40 & 41 Vict. c. 31), ss. 3, 5. As to the necessity for the consent in writing of the Commissioners of Woods, or of Works, before the powers of the Act can be exercised by the Board of Agriculture and Fisheries, or other persons with regard to Crown lands, see p. 156, *ante*. For the improvements authorised by the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), see title REAL PROPERTY AND CHATTELS REAL.

(*l*) 45 & 46 Vict. c. 38, s. 25 (see title REAL PROPERTY AND CHATTELS REAL). The power was extended to include these improvements by the Crown Lands Act, 1894 (57 & 58 Vict. c. 43), s. 2.

(*m*) Namely, the rebuilding and enlargement of the office of the Commissioners of Woods, the erection or re-erection of buildings, the construction or re-construction of roads and bridges, and the enlargement or improvement of buildings, roads and bridges (Crown Lands Act, 1906 (6 Edw. 7, c. 28), s. 4).

(*n*) Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 1.

(*o*) *Ibid.*

(*a*) The sums specified are: (1) a sum of £600,000, which became a loan upon the land revenues under the statutes 53 Geo. 3, c. 121; 57 Geo. 3, c. 24; 1 Geo. 4, c. 71; 5 Geo. 4, c. 48; (2) a sum of £400,000, borrowed under statute 7 Geo 4, c. 77.

(*b*) The repayment is to include so much of the above sum of £400,000 (see last note) as may have been paid off out of the income of the land revenues prior to resumption.

(*c*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 114. This provision would (*semble*) include payments out of income for improvements (see the text, *supra*). As to the discharge of capital charges prior to resumption, see the text, *supra*.

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236. Any sums received in respect of sales or exchanges of the land revenues and possessions of the Crown, not immediately wanted for the purposes to which they are made applicable, may be laid out by the Commissioners of Woods in the meantime in the purchase of Consolidated Bank Annuities, Reduced Bank Annuities, or certain investments authorised by the Trustee Act, 1893 (*d*), in the name of the Treasury (*e*).

Surplus revenues.

The amount of the dividends on the stocks and annuities so purchased as they become due is to be placed by the Bank of England to the credit of the Commissioners of Woods, and is to be applied and disposed of by the Commissioners in the same manner and for the same purposes as, and considered in all respects as part of the annual income of the land revenues and possessions of the Crown (*f*).

Raising money.

237. Where it is desired to raise money for any of the purposes to which sums received from sales and exchanges may be applied, the Treasury may sell out all or any part of the stocks and annuities purchased as above, and the sums raised by such sale are to be paid into the Bank of England and placed to the credit of the Commissioners of Woods, and must be applied by the latter for the same purposes as, and considered in all respects as part of, the sums received under the authority of the Crown Lands Acts in respect of sales or exchanges (*g*).

Stock sold by the Treasury under this power may be transferred by any person or persons appointed by them for that purpose by letter of attorney attested by two or more credible witnesses; and the Bank of England must permit all such transfers to be made (*h*).

Income from mines.

238. As from and after the 31st March, 1894, one moiety of the gross annual income of the land revenues of the Crown received in respect of any substance obtained by mining, quarrying, or excavating, and one moiety of the expenses incurred by the Commissioners of Woods in respect of the same, is to be carried to the account of the capital of the land revenues of the Crown, and the residue of such gross annual income and expenses is to be carried to the account of the income of the land revenues (*i*).

"The Mines Account."

For these purposes the Commissioners of Woods must keep a separate account in the form directed by the Treasury, called "The

(*d*) 56 & 57 Vict. c. 53; namely, to those authorised by s. 1, as subsequently extended to certain colonial stock and metropolitan water stock; see the Colonial Stock Act, 1900 (63 & 64 Vict. c. 62), s. 2; Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 17 (4); and title TRUSTS AND TRUSTEES.

(*e*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 109, as extended by the Crown Lands Act, 1894 (57 & 58 Vict. c. 43), s. 1. The Bank is required to permit transfers to be made of the stocks and annuities purchased, and trustees are to be accepted by the Commissioners of Woods in the name and on behalf of the treasurer.

(*f*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 110.

(*g*) *Ibid.*, s. 111.

(*h*) *Ibid.*, s. 112. As to the application of these powers generally to Scotland, see the Crown Lands (Scotland) Act, 1833 (3 & 4 Will. 4, c. 69), s. 3.

(*i*) Crown Lands Act, 1894 (57 & 58 Vict. c. 43), s. 3 (1).

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Mines Account," which is to include all receipts and outgoings in respect of the above-mentioned mines, quarries, and excavations, and must show the respective amounts to be carried under the above provision to the capital and to the income of the land revenues of the Crown (*k*).

Payment of allowances.

239. The Treasury may from time to time direct the Commissioners of Woods to pay and apply an annual sum not exceeding in the whole £6,157 17*s.* 8*d.* out of the produce of the hereditary land revenues, woods, and forests under their management, for the payment of various ancient perpetuities, grants, stipends, salaries, and allowances formerly payable out of the Civil List revenues of George IV. But the Treasury may not thereby give or grant any greater, higher, or other interest in such grants, stipends, and allowances than the persons entitled thereto held or enjoyed under the grants in force at the time of the decease of His Majesty George IV. (*l*).

Application of residue.

240. Subject to these provisions and to the powers of application for improvements (*m*), the annual income of all the possessions and land revenues of the Crown (*n*), under the management of the Commissioners of Woods, including fines on leases, and all other sums in respect of leases or otherwise (except from leases of royal forests (*o*) or sales or exchanges) is to be applied:—In the first place, in payment of the costs, charges, and expenses attending management; in the next place, in the payment of any annual sums or pensions, and of any other principal sum and interest charged upon such land revenues and possessions. Subject to such applications the annual income is to be paid to the Exchequer to form part of the Consolidated Fund during the present reign and six months thereafter (*p*).

Power of Treasury to release debts.

241. Where it appears that any debt or sum of money due or claimed to be due to the capital or income of the hereditary land revenues under the management of the Commissioners of Woods is irrecoverable in whole or in part, or that it is inexpedient to take proceedings for the recovery thereof, the Treasury may by order direct that the debt or sum shall, either in whole or in part, be released or discharged either absolutely or subject to any conditions they may think expedient. But no such debt may be released without the consent of the Crown in writing under the royal sign manual. And where proceedings at law or in equity have been commenced by the Attorney-General for England or Ireland for establishing

(*k*) Crown Lands Act, 1894 (57 & 58 Vict. c. 43), s. 3 (2).

(*l*) Crown Lands Act, 1833 (3 & 4 Will. 4, c. 86), s. 1. These charges and annuities were kept alive by the Civil List Act, 1837 (1 & 2 Vict. c. 2), s. 1.

(*m*) See the text, *supra*.

(*n*) Including lands in Scotland; Crown Lands (Scotland) Act, 1833 (3 & 4 Will. 4, c. 69), s. 16.

(*o*) See the text, *supra*.

(*p*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 113; Civil List Acts, 1837 (1 & 2 Vict. c. 2), s. 2; 1901 (1 Edw. 7, c. 4), s. 1.

the title of the Crown to, or recovering, any real or personal property or forestal right to which the Crown claims to be entitled, or where any petition of right has been presented to His Majesty touching or concerning any real or personal property or forestal right of or to which His Majesty may claim to be seised or entitled, any arrangement for the settlement of the matter in dispute (*q*), or any discharge as above, is subject to the approval of the Attorney-General for England or Ireland as the case may be (*r*).

When enrolled in the office of Land Revenue Records and Enrolments, either by a deposit of the duplicate or otherwise, the Treasury order is binding and conclusive as to the hereditary possessions and land revenues in England and Wales (*s*).

Surrender of ecclesiastical pensions

242. Any bishop, rector, vicar, or other ecclesiastical person, or collegiate body, being in receipt of a pension not exceeding the annual sum of £10, charged upon the hereditary revenues in England, Wales, or the Isle of Man (*t*), may, with the consent of the Ecclesiastical Commissioners and of the patron of the living or preferment, sell and convey, or enter into an agreement with the Commissioners of Woods, or either of them, for the sale and conveyance of, the pension to the Crown, at the price and subject to the conditions agreed on. But where the purchase-money exceeds £100, the purchase is not to be completed without the previous authority of the Treasury signified by warrant (*a*).

The purchase-money is to be paid by the Commissioners of Woods to the Ecclesiastical Commissioners, whose receipt is sufficient discharge (*b*), and on such payment, and the execution of a surrender or conveyance to the Crown by the person for the time being entitled, the pension is to cease and be extinguished, and the hereditary land revenues for ever discharged therefrom (*c*).

The purchase-money is to be applied by the Ecclesiastical Commissioners at their discretion, either (1) in the purchase of consolidated or reduced annuities, or in the purchase of freehold land to be annexed, conveyed, or appropriated for the purposes of the living, preferment, or collegiate body to which the pension was payable;

(*q*) As to the arrangement of disputes generally, see p. 155, *post*.

(*r*) Crown Lands Act, 1853 (16 & 17 Vict. c. 56), s. 5. This provision extends to Scotland, the Lord Advocate being substituted for the Attorney-General (Crown Lands Act, 1894 (57 & 58 Vict. c. 43), s. 11 (1), (3)).

(*s*) Crown Lands Act, 1853 (16 & 17 Vict. c. 56), s. 5; or if the order relates to Ireland, when enrolled in the manner prescribed by the Crown Lands Act, 1829 (10 Geo. 4, c. 50), ss. 70—72 (*ibid.*); or if to Scotland, when enrolled in the office of the Crown in Chancery for Scotland (Crown Lands Act, 1894 (57 & 58 Vict. c. 43), s. 11 (2)).

(*t*) Namely, by virtue of an instrument dated the 5th June, 1678, and by other instruments and ways and means.

(*a*) Crown Lands Act, 1853 (16 & 17 Vict. c. 56), s. 1.

(*b*) A receipt under their corporate seal is evidence of payment and of their consent (*ibid.*, s. 2).

(*c*) *Ibid.* Where the surrender, conveyance, or receipt has been enrolled in the office of Land Revenue Records and Enrolments, either by deposit of duplicate or otherwise, the same, or an authenticated copy of the enrolment, is admissible in evidence without proof of execution of the deed or receipt, and the enrolment of the deed is conclusive evidence that the provisions of the Act have been complied with (*ibid.*).

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or (2) in the purchase or redemption of any existing charges, incumbrances on or outgoing from the living or preferment, or the property of the collegiate body; or (3) in the substantial or permanent improvement of the parsonage house, or glebe land, or other buildings or land annexed to the living, preferment, or collegiate body (*d*).

When pensions payable.

243. The pensions or yearly sums charged upon or payable in respect of any part of the hereditary land revenues in England, Wales, or the Isle of Man are to become due half-yearly, namely, on the 5th April and 10th October in every year (*e*).

(4) *The Department of Works and Public Buildings.*

Commissioners of Works and Public Buildings.

244. The Commissioners of Works and Public Buildings comprise a First Commissioner, appointed by royal warrant under the sign manual and holding office during pleasure (*f*), together with the five principal Secretaries of State and the President of the Board of Trade, who are *ex officio* Commissioners (*g*).

The Commissioners are constituted a corporation under the name and style of "The Commissioners of His Majesty's Works and Public Buildings," and by that name are to have perpetual succession and use a common seal, which may be altered from time to time as they think fit, for the purpose of taking and holding all lands and hereditaments vested in them by statute or purchase, and of conveying, assigning, leasing, or otherwise disposing of such lands, and entering into covenants or agreements respecting the same, but not for any other purpose (*h*).

Unless it is expressly provided to the contrary, acts of the Commissioners are valid if done by the First Commissioner or any two of them (*i*).

(*d*) Crown Lands Act, 1853 (16 & 17 Vict. c. 56), s. 3. The dividends or interest on the stock, or the rents and profits of the land purchased, are to be paid and belong to the person or body who would have been entitled to the pension; and if the money is laid out in the purchase or redemption of any charge, incumbrance or other outgoing, the same is not to be kept on foot, but released or extinguished (*ibid.*).

(*e*) *Ibid.*, s. 4. The person who on either of such days is in possession of the preferment, appointment, or office in respect of which the pension is payable, is entitled to receive the whole net amount of one half-year's pension after making all lawful deductions, although he may not have been in enjoyment of the preferment etc. during the whole half-year, and his predecessor or the representatives of the latter are not to be entitled to any apportioned part of such half-year's pension (*ibid.*).

(*f*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 1. Under s. 1 of this Act the First Commissioner of Woods, Forests, and Works became the First Commissioner of Works, the duties as to woods and works, which had been amalgamated under the Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1), being separated.

(*g*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 15.

(*h*) Commissioners of Works Act, 1852 (15 & 16 Vict. c. 28), s. 1.

(*i*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 26; Commissioners of Works Act, 1852 (15 & 16 Vict. c. 28), s. 2. There may be paid to the First Commissioner such salary, not exceeding £2,000 per annum, and to the secretary, clerks, and other officers of the department such salaries, as the Treasury may appoint, but the *ex officio* Commissioners are to receive no special salaries for acting as such. Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 17.

The First Commissioner may be a member of the House of Commons (*k*), and the *ex officio* Commissioners are invariably members of the Ministry (*l*).

Appointment of officers.

245. Architects, surveyors, and other officers of a similar character may be appointed or employed by the Commissioners of Works as they think necessary, with the approval of the Treasury. But the secretary, clerks, messengers, and any other officers of the department are appointed by the Treasury subject to dismissal by the Commissioners of Works (*m*).

(5) *General Powers of the Department of Works and Public Buildings.*

General powers.

246. The duties, powers, exemptions, and privileges performed, exercised, or enjoyed by the Surveyor-General of Works and Public Buildings prior to the 13th February, 1832 (*n*), so far as not inconsistent with the provisions of the Crown Lands Act, 1851, or subsequent Acts, are to be performed or enjoyed by the Commissioners of Works (*o*).

Royal parks.

247. In addition to these duties, the powers and duties formerly performed and exercised by the Commissioners of Woods in relation to certain royal parks, gardens, and possessions (*p*) have been

The salaries, superannuations, retired allowances, and incidental expenses of the departments, with the expenses of the Commissioners incurred under the Crown Lands Act, 1851 (14 & 15 Vict. c. 42), except expenses to be defrayed out of moneys provided under the Acts mentioned in the schedule to the Act, or transferred to the credit of, or made payable to, or applicable by, the Commissioners under the Act, are to be defrayed out of the annual votes. But the profits of the herbage and like profits of the parks, gardens, and possessions placed under the management of the Commissioners by the Crown Lands Act, 1851 (14 & 15 Vict. c. 42), after payment thereout of any tithe, rent-charges, or other like charges upon such parks, gardens etc., are to be carried to the Consolidated Fund (*ibid.*, s. 25).

(*k*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 20. See also note (*e*), p. 40, *ante*.

(*l*) See p. 37, *ante*.

(*m*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 16. In all cases where the Commissioners of Works are required or authorised to take security from any receiver, collector, clerk, or other officer or contractor, or may think it proper to do so for securing the due performance of any duty or contract, the security must be taken by bond to the Crown. Such security may be dispensed with if the Commissioners think fit, security by way of deposit, investment, mortgage, lien or charge, insurance or guarantee, being taken in place of the same for the due performance of any duty or contract if the Commissioners think fit (Commissioners of Works Act, 1852 (15 & 16 Vict. c. 28), s. 3).

(*n*) Namely, the date of the passing of the Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1), by which the duties of the Surveyor-General of Works (whose office was abolished) were amalgamated with those of the Commissioners of Woods, Forests, Works, and Public Buildings.

(*o*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 21. All Acts of Parliament, deeds, and other instruments in which the Surveyor-General is mentioned, so far as in force and not inconsistent with subsequent Acts, are to apply to the Commissioners of Works as if expressly mentioned (*ibid.*).

(*p*) Namely, St. James', Hyde, and the Green Parks; Kensington Gardens; Chelsea Garden; the Treasury and Parliament Square Gardens; Primrose Hill; Regent's, Greenwich, Hampton Court, Bushey, and Holyrood Parks; Kew Gardens Pleasure Grounds and Green; Kew and Richmond Roads; Hampton Court Gardens, Green and Road; Richmond Park and Green (Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 22). The Commissioners of Works and the Richmond

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transferred to the Commissioners of Works, but all houses, gardens, and portions of ground in any of such royal parks as were on the 1st August, 1851, leased, or agreed to be leased, are to remain under the management of the Commissioners of Woods; and all powers of leasing any part of Victoria and Regent's Parks and all powers in relation to the parts so to be leased are to remain vested in and exercisable by the Commissioners of Woods (*q*).

Transferred powers.

248. The Commissioners of Works are also expressly directed to perform and exercise all the powers and duties conferred upon the Commissioners of Woods under various local and other Acts (*a*), which are to apply to the Commissioners of Works and Public Buildings as if named therein, and they are to be incorporated thereunder (where provision is made to that effect) in place of the Commissioners of Woods, with the perpetual succession, use of common seal, and other rights, privileges, and powers conferred upon the Commissioners of Woods thereby. All the property whatsoever which on the 1st August, 1851, was vested in the Commissioners of Woods in a corporate capacity or otherwise, alone or jointly with others, under or for the purposes of the Acts, is vested as from the same date in the Commissioners of Works, subject to the same conditions in every respect as in the case of the Commissioners of Woods (*b*).

Application of moneys.

249. All moneys which would have been payable to or applicable by the Commissioners of Woods under or for the purposes of any

Borough Council are empowered to enter into an agreement for the transfer to the council of the control and management as open spaces of Richmond and Kew Greens, and on the execution of such agreement the Open Spaces Acts, 1877 to 1890, are to apply thereto subject to any conditions or reservations in the deed of transfer. The Board of Agriculture and Fisheries is empowered to enter into a like agreement with the council as to the land, formerly part of Kew Green, lying between the latter and the north-west entrance to the Royal Botanic Gardens; but until such transfer the land is to be deemed portion of those gardens (Crown Lands Act, 1906 (6 Edw. 7, c. 28), s. 7). The management of Victoria, Battersea, and Kennington Parks, Bethnal Green Museum Garden, and Chelsea Embankment was in 1887 transferred from the Commissioners of Works, and is now vested in the London County Council, the expenses being no longer borne by the Exchequer, but by the local rates (see London Parks and Works Act, 1887 (50 & 51 Vict. c. 34); Local Government Act, 1888 (51 & 52 Vict. c. 41,) s. 40 (8)).

(*q*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 23, amended by the London Parks and Works Act, 1887 (50 & 51 Vict. c. 34), s. 2 (1), which is in part repealed by the Statute Law Revision Act, 1908 (8 Edw. 7, c. 49).

(*a*) Namely, 4 Geo. 4, c. 74; 9 Geo. 4, c. 25; 3 & 4 Will. 4, c. 43 (Holyhead Roads); 4 & 5 Will. 4, c. 66 (Menai and Conway Bridges); 5 & 6 Will. 4, c. 21 (Shrewsbury and Holyhead Roads); 2 & 3 Vict. c. 80; 3 & 4 Vict. c. 87; 4 & 5 Vict. c. 12; 13 & 14 Vict. c. 103; 13 & 14 Vict. c. 109 (Metropolis improvements); 7 & 8 Vict. c. 60 (Trafalgar Square); 8 & 9 Vict. c. xvii. (Clerkenwell improvements); 8 & 9 Vict. c. 63 (Geological Survey); 8 & 9 Vict. c. clxxviii.; 10 & 11 Vict. c. cxxxi.; 13 & 14 Vict. c. cii. (Westminster improvements); 9 & 10 Vict. c. 34 (Spitalfields improvements); 9 & 10 Vict. c. 38; 11 & 12 Vict. c. 102 (Battersea Park); 9 & 10 Vict. c. 39 (Battersea Bridge and Chelsea improvements); 10 & 11 Vict. c. 24; 13 & 14 Vict. c. 116 (Portland Harbour); 11 & 12 Vict. c. 53 (Windsor); Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 22, Schedule, as repealed in part by the Statute Law Revision Acts, 1892 and 1894 (55 & 56 Vict. c. 19; 57 & 58 Vict. c. 56).

(*b*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 27.

of the above Acts, or for the purposes of any of the duties or powers vested in the Commissioners of Works under the Crown Lands Act, 1851 (or, *semble*, other Acts), are to be payable to and applicable by the latter (*c*).

Control of public buildings etc.

250. The management and control of certain public buildings is vested in the Commissioners of Works under various Acts (*d*), as also the management of the forestal rights and interests of the Crown in Epping Forest (*e*), the administration of the Acts relating to the geological survey of the United Kingdom (*f*), the power of erecting and repairing public statues in the metropolitan police

(*c*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 28. The provisions of the Crown Lands Act, 1851 (14 & 15 Vict. c. 42), are not to abridge or interfere with any rights of the Crown, the Treasury, or the Chancellor of the Exchequer, or any grantee of the Crown, in respect of any appointment usually made by the same, or with the right of appointment of master-keepers, under-keepers, or other officers of or in any royal forest so long as the last-mentioned right is vested in any warden or ranger of any such forest, or with any privileges or advantages which may be rightfully claimed or enjoyed under any letters patent granted by the late Queen or her predecessors, of any office, bailiwick, walk, or lodge, within any royal forest to which the Act relates (*ibid.*, s. 40).

(*d*) See the statutes 14 & 15 Vict. c. 95; 30 & 31 Vict. c. 40 (approaches to Houses of Parliament, paving, lighting etc.); Courts of Justice (Salaries and Funds) Act, 1869 (32 & 33 Vict. c. 91), s. 15 (Bankruptcy Courts); Commissioners of Works Act, 1894 (57 & 58 Vict. c. 23), ss. 2, 3 (Civil Service Commission lands and building, site of Millbank Prison chapel); Courts of Justice Building Act, 1865 (28 & 29 Vict. c. 48), s. 22; Court of Chancery Funds Act, 1872 (35 & 36 Vict. c. 44), s. 21 (certain offices of Courts of Chancery); Courts of Justice Concentration (Site) Act, 1865 (28 & 29 Vict. c. 49); and 34 & 35 Vict. c. 57 (site and approaches, Royal Courts of Justice); County Court (Buildings) Act, 1870 (33 & 34 Vict. c. 15), ss. 3, 4 (county court buildings and property); Customs Buildings Act, 1879 (42 & 43 Vict. c. 36) (lands held for the service of the Customs); Public Offices Site Act, 1882, and Public Offices (Whitehall) Site Act, 1897 (45 & 46 Vict. c. 32; 60 & 61 Vict. c. 27) (sites for new Admiralty and War Offices; Patent Office (Extension) Act, 1897 (60 & 61 Vict. c. 25) (site for Patent Office extension); Inland Revenue Buildings Act, 1881 (44 & 45 Vict. c. 10) (land held for service of the Inland Revenue); Royal Military Asylum, Chelsea (Transfer), Act, 1884 (47 & 48 Vict. c. 32) (Chelsea Military Asylum); Millbank Prison Act, 1892 (55 & 56 Vict. c. 1) (site of prison); Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), s. 3 (2) (buildings etc. of Middlesex Registry). See also, as to public offices in Westminster, Whitehall, Downing Street etc., 18 & 19 Vict. c. 95; 22 Vict. c. 19; 24 & 25 Vict. cc. 33, 38; 25 & 26 Vict. c. 74; 27 & 28 Vict. c. 51; 28 & 29 Vict. cc. 31, 32; 29 & 30 Vict. c. 21; 37 & 38 Vict. c. 84; 44 & 45 Vict. c. 7; 59 Vict. sess. 2, c. 5; 59 & 60 Vict. c. 23; 61 & 62 Vict. c. 5; 3 Edw. 7, c. 41: as to the National Gallery, 29 & 30 Vict. c. 83; 30 & 31 Vict. c. 41; 1 Edw. 7, c. 16: as to the National Portrait Gallery, 52 & 53 Vict. c. 25: as to the Patent Office, 3 Edw. 7, c. 41: as to the Admiralty and War Office, 61 & 62 Vict. c. 5; 3 Edw. 7, c. 41: as to the Science and Art Buildings, South Kensington, 61 & 62 Vict. c. 5; 3 Edw. 7, c. 41: as to the British Museum, 3 Edw. 7, c. 41: as to improvements in the neighbourhood of Buckingham Palace, 15 & 16 Vict. c. 78; 16 & 17 Vict. c. 44; 20 & 21 Vict. c. 67; 27 & 28 Vict. c. 111: as to Somerset House, 15 & 16 Vict. c. 40; 17 & 18 Vict. c. 93; 25 & 26 Vict. c. 93, s. 73; as to a lease to King's College, 36 & 37 Vict. c. 4; as to Post Office buildings in Queen Victoria Street and West Kensington, 61 & 62 Vict. c. 5. The property of the metropolitan police courts was transferred from the Board of Works to the Receiver for the Metropolitan Police District by the Metropolitan Police Courts Act, 1897 (60 & 61 Vict. c. 26), s. 3.

(*e*) Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 6.

(*f*) Geological Survey Act, 1845 (8 & 9 Vict. c. 63).

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district (*g*), and the guardianship and control of ancient monuments (*h*).

Acquisition of land.

251. The Commissioners of Works may purchase, take, or accept any hereditaments of any tenure which may be necessary for the public service, and sell or exchange the same, and give a good discharge for the purchase-money; they may also grant any lease or underlease of any hereditaments so purchased or taken, and enter into agreements for sale, exchange, lease, or underlease. All purchases, exchanges, sales, or leases are to be made, and the produce and income applied, under the direction of the Treasury (*i*).

The moneys arising from such sales or leases are to be paid into the Consolidated Fund; but the receipt of the Commissioners is a sufficient discharge to any purchaser or lessee paying moneys to them (*k*).

Enrolment of conveyances.

252. Every instrument whereby any land or interest in land in England or Wales is conveyed or assigned to or by the Commissioners of Works, under or for the purposes of the Commissioners of Works Act, 1852, must be enrolled in the Central Office of the Supreme Court, and if so enrolled is not to require any other

(*g*) Public Statues (Metropolis) Act, 1854 (17 & 18 Vict. c. 33). Under this Act the Commissioners out of money appropriated by Parliament for that purpose may erect any statue in any public place, namely, any street, square, court, or other like place, within the metropolitan police district, in or over which there is any public right of ingress, egress, regress, or thoroughfare, and inclose the same and the pedestal and any surrounding space with a fence or railing as they think fit (*ibid.*, ss. 1, 2). The Commissioners may amend or repair any public statue, namely, statues mentioned in the schedule to the Act or any statues erected after the 10th July, 1854, wholly or in part in any public place as defined above, and the pedestal of, and the fence or railing surrounding, the same, with moneys appropriated thereto by Parliament (*ibid.*, s. 3). Full powers are conferred upon the Commissioners for the erection, restoration, or repair of any such public statues, and no public statue (as above defined) may be erected in any public place (as above defined) without their written assent (*ibid.*, ss. 4, 5). The owner of any statue (not being a statue mentioned in the schedule to the Act) situated within the metropolitan police district (namely, as defined by the Metropolitan Police Act, 1829 (10 Geo. 4, c. 44)), may, with the assent in writing of the Treasury, transfer the same to the Commissioners of Works, and upon completion of such transfer the statue is to be deemed a "public statue" under the Public Statues (Metropolis) Act, 1854 (17 & 18 Vict. c. 33), ss. 1, 7.

(*h*) Under the Ancient Monuments Protection Acts, 1882 to 1900. As to these Acts see title OPEN SPACES AND RECREATION GROUNDS.

(*i*) Commissioners of Works Act, 1852 (15 & 16 Vict. c. 28), s. 2. The provision of this section requiring enrolment of conveyances of freeholds to or by the Commissioners is repealed as to England and Wales and replaced by similar provisions by the Commissioners of Works Act, 1894 (57 & 58 Vict. c. 23) (see p. 137, *post*), but is still in force as to Ireland (see the Commissioners of Works Act, 1894 (57 & 58 Vict. c. 23), s. 1 (4)). In the case of purchases, sales, leases, or exchanges, it is not necessary for the vendor, purchaser, lessor, or lessee to ascertain whether the consent of the Treasury has been given (Commissioners of Works Act, 1894 (57 & 58 Vict. c. 23), s. 1 (2)).

(*k*) Commissioners of Works Act, 1852 (15 & 16 Vict. c. 28), s. 2. Apart from the word "heritages" it seems doubtful whether these provisions as to buildings etc. not required refer only to the Supreme Court Buildings in Edinburgh, vested in the Commissioners by the previous section (s. 4), or to any lands, buildings etc. In any case the provision seems to be covered by the general powers conferred by s. 2; see the text *supra*.

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enrolment, acknowledgment, or registry. But this provision is not to apply to land the title of which has been registered under the Land Registry Act, 1862, or the Land Transfer Act, 1875 (*l*).

Compulsory powers.

253. For the purpose of the purchase of land by the Commissioners of Works the powers of the Lands Clauses Acts (except the provisions relating to the purchase and taking of land otherwise than by agreement) may be exercised by the Commissioners (*m*).

Metropolis.

254. Nothing in the Metropolis Management Act, 1855 (*n*), is to divest the Commissioners of Works of any power or property for the time being vested in them; and nothing in the Act is to extend to authorise or empower any vestry or borough council (*o*) to exercise any power or control whatsoever in or over any of the royal or public parks, gardens, or pleasure grounds, the management whereof may be for the time being vested in the Commissioners (*p*).

(6) *The Office of Land Revenue Records and Enrolments.*

Office of Land Revenue Records and Enrolments.

255. The Treasury are required to provide a proper building in London or Westminster, to be called the Office of Land Revenue Records and Enrolments, for the reception and safe custody of all the books of entry, records, deeds, instruments, writings, maps, plans, and other official papers which were or ought to have been on February 13th, 1832, in the custody of the auditors or acting auditors of the land revenues of the Crown in England or in the Principality of Wales (*q*), and also for the reception and safe custody of the deeds and instruments to be enrolled after that date, and of such other writings, surveys, maps, plans, and other official papers as are directed to be deposited therein (*r*).

Keeper of the records

256. The Treasury are also empowered to appoint a keeper of the records and enrolments, and to make rules and regulations (which must not be contrary to the provisions of the Crown Lands Act, 1832) for the execution of the office (*s*). The keeper of the records holds office at the pleasure of the Treasury, and may be

(*l*) Commissioners of Works Act, 1894 (57 & 58 Vict. c. 23), s. 1 (3). As to the mode of registering documents in Scotland, see the Commissioners of Works Act, 1852 (15 & 16 Vict. c. 28), s. 7.

(*m*) Commissioners of Works Act, 1894 (57 & 58 Vict. c. 23), s. 1 (1).

(*n*) 18 & 19 Vict. c. 120. For the provisions of the Act, see title METROPOLIS.

(*o*) Vestry or district board in the Act. As to the transfer of the powers of these bodies, see note (*n*), p. 236, *post*.

(*p*) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 241. The Act is not to abridge, alter etc., any powers, remedies etc., of the Commissioners in relation to the possessions of the Crown or of the public (*ibid.*; and see pp. 133 *et seq.*, *ante*).

(*q*) The duties of these officers were transferred to the Office of Land Revenue Records and Enrolments by the Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1), s. 21. As to enrolment generally, see p. 171, *post*.

(*r*) Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1), s. 15. The Treasury were empowered to cause the removal of all books of entry, records, deeds etc., in the custody of the former auditors, to the new office (*ibid.*, s. 20).

(*s*) *Ibid.*, s. 16.

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removed at pleasure. His salary or other remuneration is to be such as the Treasury may assign to him (*t*).

Expenses and fees.

257. The expenses for providing and maintaining the building and the expenses of carrying on the business of the office, including salaries and other remunerations, are to be paid out of the fees directed to be taken for enrolments, searches, and copies of deeds and documents (*a*).

Accounts of all moneys received for fees in the office must be rendered by the keeper of the records to the Treasury as often as the latter may require, and also accounts of all disbursements made for payment of salaries and otherwise for carrying on the business of the office. Moneys received and not disbursed are to be carried to and form part of the land revenues of the Crown (*b*).

The fees to be taken in the Office of Land Revenue Records and Enrolments are prescribed by Treasury warrant (*c*). The fees for enrolment by Government departments are usually remitted, but certain fees are to be taken by the Commissioners of Woods and the Commissioners of Works from persons interested under deeds and documents in respect of enrolment in the Office of Land Revenue Records and Enrolments (*d*).

Effect of enrolment.

258. The enrolment of any deed, instrument, or writing signed by the Commissioners of Woods or of Works, or to which either of them is a party, or which in any manner affects or relates to any part of the hereditary possessions and land revenues of the

(*t*) Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1), ss. 17, 18.

(*a*) *Ibid.*, s. 19. The fees for enrolments etc. are to be such as may be appointed by the Treasury (*ibid.*, s. 22; and see note (*c*), *infra*). By the Public Offices Site Act, 1882 (45 & 46 Vict. c. 32), s. 8, the Commissioners of Woods were empowered to provide a new office out of the capital of the land revenues of the Crown, subject to the approval of the Treasury. This section has now been repealed by the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22).

(*b*) Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1), s. 29.

(*c*) Treasury Warrant, 21st December, 1903, No. 1170, issued under the Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1), and subsequent Acts. The fees are as follows: (1) enrolment of a document by entry, 5*s.*, with a further charge of 6*d.* for each folio of seventy-two words beyond the tenth folio; (2) for the enrolment of a memorial of a deed pursuant to the Copyhold Act, 1894 (57 & 58 Vict. c. 46), 5*s.*; (3) for a certified copy of an extract from any document, 6*d.* for each folio of seventy-two words; (4) for making and examining a copy of a plan or of an extract from a plan, 2*s.* 6*d.* for every hour occupied thereon; (5) for the inspection of one document, 1*s.*; (6) for the inspection of several documents belonging to one series produced on one and the same day, 2*s.* 6*d.* The previous warrants of the 21st December, 1896, and 4th September, 1897, are annulled by this warrant.

(*d*) The practice is to remit the above fees when chargeable against any department of His Majesty's Government; but a uniform enrolment fee of 5*s.*, and in the case of deeds and documents which have to be enrolled by entry at length an additional fee of 6*d.* per folio for every folio of seventy-two words after the tenth folio, is to be taken by the Commissioners of Woods and the Commissioners of Works respectively from the persons interested under such deeds and documents in respect of enrolment in the Office of Land Revenue Records and Enrolments (Treasury Warrant, 21st December, 1903, No. 1171, issued under the authority of the Crown Lands Act, 1851 (14 & 15 Vict. c. 42), and of all other enabling powers).

Crown (*e*), when enrolled in the Office of Land Revenue Records and Enrolments, is to be as good and available and of the like force and effect (without enrolment or acknowledgment in any court or courts of law or equity, and without registration) as if enrolled in the Supreme Court, or as if a memorial had been entered or registered in the office for registering deeds in the county or counties in which such land revenues or possessions or any of them are situate (*f*).

Certificates.

259. Certificates or other documents required to be given or signed by the keeper of the records and enrolments may be given or signed by any person acting with the sanction of the Treasury as his deputy or assistant, whether the office of keeper is vacant or not, and it is not necessary to prove the handwriting of the person so acting, or his authority to act (*g*).

(7) *Duties of Receivers.*

Distress.

260. Any person appointed as receiver of the issues, revenues, and profits of the possessions and land revenues of the Crown may by virtue of his appointment, and without further authority, either by himself or any person whom he may depute, make distress for any rents in arrear or unpaid from any lessee, occupier, or tenant of any of the estates or possessions, or from any person liable to any quit or other rent within his collection, receipt, or management, and impound, sell, and dispose of the goods, chattels, and effects so distrained. But in making or causing any distress to be made, and in relation to any question of law or otherwise arising thereon, the receiver must obey and conform to any orders and regulations given to him by the Commissioners of Woods (*h*).

Payments.

261. At the end of every month (unless otherwise directed by the Commissioners of Woods (*i*)) receivers must transmit all sums received during the month to the Commissioners of Woods; and whenever any such receiver has received or got into his hands any sum belonging to the Crown exceeding £500, he must (unless previously instructed to the contrary by the Commissioners of Woods (*i*)) forthwith transmit the same to the Commissioners. If he fails to do so, or to apply or dispose of the money in any other manner directed by the Commissioners, he becomes chargeable, and is to be charged, with interest for every such sum at such rate (not

(*e*) Or any other lands, tenements, or hereditaments situate in England or Wales, for the time being under the management or control of the Commissioners or either of them.

(*f*) Crown Lands Act, 1853 (16 & 17 Vict. c. 56), s. 6.

(*g*) Crown Lands Act, 1894 (57 & 58 Vict. c. 43), s. 10.

(*h*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 90. As to the powers of the Treasury to make rules relating to the receipt of money, see p. 125, *ante*. All sheriffs, mayors, justices, bailiffs, constables, headboroughs, and other officers and ministers of justice, are required to aid and assist the receiver or his substitute in making such distresses, in impounding, selling, and disposing of the same, and in all other matters relating thereto, or to the execution of his office (Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 90). This power is applicable to foreshore vested in the Board of Trade (see note (*o*), p. 144, *post*).

(*i*) Or, *semble*, by the Treasury; see p. 125, *ante*.

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exceeding £10 per cent. per annum) as the Commissioners appoint, from the day or time at which it was received until it is transmitted or paid over as directed by the Commissioners (*k*).

Receiver's accounts.

262. Receivers must render accounts to the Commissioners of Woods of all moneys received and of all other acts, matters, and things done by them on account of or in relation to the possessions and land revenues of the Crown at the time required by the Commissioners. These accounts are to be tried and examined by the Commissioners and to be incorporated with and form part of their accounts, and when so incorporated and audited and passed (*l*), the receipts of the Commissioners for the balance of the accounts are to be good and effectual discharges to the receivers (*m*).

Verification.

The Commissioners of Woods or any of them may receive a verification and take an examination upon oath (or declaration in lieu of an oath (*n*)) concerning any account, survey, estimate, report, or other matter relating to the lands under their management, or direct the verification to be made before any justice of the peace or magistrate (*o*).

If any receiver, deputy, accountant, or other person is guilty of wilful and corrupt perjury in such verification or examination, or wilfully forswears himself in regard to any of the above matters, he may be punished under the law in force relating to wilful and corrupt perjury (*p*).

(8) *Accounts and Audit.*

Commissioners' accounts.

263. On or before the 30th November in each year the Commissioners of Woods must prepare and transmit to the Comptroller and Auditor-General (*a*) abstract accounts for the year ended on the 31st March next preceding, classed under distinctive headings, of the receipt and expenditure of the capital and income derived from the possessions and land revenues of the Crown, and of any other funds under their control and management. After examining the accounts and certifying their conformity or otherwise with the Acts relating to the receipt and expenditure of the funds to which they relate, the Comptroller and Auditor-General must transmit copies of the accounts so examined and certified, with a report thereon, to the Treasury on or before the 31st January next following,

(*k*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 84 (applicable to foreshore vested in the Board of Trade ; see note (*o*), p. 144, *post*).

(*l*) As to the audit of the accounts of the Commissioners, see p. 141, *post*.

(*m*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 81 (applicable to foreshore vested in the Board of Trade ; see note (*o*), p. 144, *post*).

(*n*) Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 12; Statutory Declarations Act, 1835 (5 & 6 Will. 4, c. 62), ss. 1—4 ; and see note (*h*), p. 27, *ante*.

(*o*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 82 (applicable to foreshore vested in the Board of Trade ; see note (*o*), p. 144, *post*).

(*p*) *Ibid.*, s. 83. See, as to the Board of Trade, note (*o*), p. 144, *post*. As to perjury generally, see title CRIMINAL LAW AND PROCEDURE.

(*a*) To whom the duties of the former Commissioners of Audit have now passed ; see title REVENUE.

and the latter must lay the same before the House of Commons on or before the following 31st March, if Parliament is then sitting, and if not, then within a fortnight of the next meeting of Parliament (*b*).

Annual report.

264. The Commissioners of Woods must also within three calendar months after the 31st March in every year certify and report in writing under their hands and seals to the Crown and both Houses of Parliament what leases, sales, exchanges, purchases, and grants have been made during the year ending the 5th January preceding (*c*). The reports must contain full particulars of the various transactions (*d*), and also a statement of the income and expenditure of the moneys which have arisen from the possessions and land revenues under their management, and of all debts incurred by the Commissioners and the amount of interest due thereon, and of such other matters and things as they may think fit (*e*).

Audit.

265. The Comptroller and Auditor-General (*f*) must examine, try, and audit the accounts of all moneys which by any Act are placed under the control and management of the Commissioners of Woods and the Commissioners of Works (*g*); and every general account of the land revenues of the Crown referred to the Comptroller and Auditor-General under the Crown Lands Act, 1832 (*h*), after being audited, must be delivered by him, together with the several detailed and subsidiary accounts (mentioned or referred to in the general accounts) of the receivers, surveyors, rangers, gavellers, stewards, bailiffs, collectors, or other local officers charged with the collection of land revenues, to the Keeper of the Land Revenue Records and Enrolments, not less than three years after the declaration of the general account, unless the Treasury otherwise direct (*i*). The general, detailed, and subsidiary accounts are to

(*b*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), ss. 38, 39.

(*c*) Public accounts were formerly made up to this date, but are now authorised as to certain accounts (see title REVENUE) to be made up to the 31st March.

(*d*) Namely, the terms for which leases are granted, the annual value of the tenements comprised therein and the annual value by the last preceding survey, and the rent, fines, or other consideration reserved or paid, and also, where possible, the rent and fines reserved and paid upon the last preceding lease; also the lands which have been sold, granted, or given or received in exchange, the amount of the purchase-money paid or received, and the names of the parties to or by whom, and the purposes for which, such grants etc. were made.

(*e*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 125, as amended by the Crown Lands Act, 1848 (11 & 12 Vict. c. 102), s. 8.

(*f*) See note (*a*), p. 140, *ante*.

(*g*) The Act relates to the Commissioners of Woods, Forests, Works, and Buildings, but the two departments are now separate (see note (*k*), p. 123, *ante*).

(*h*) 2 & 3 Will. 4, c. 1. This provision applies to accounts referred for audit under the Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1), the provisions of which as to audit were repealed by the Statute Law Revision Act, 1874 (37 & 38 Vict. c. 35), accounts now being referred for audit under the Exchequer and Audit Departments Act, 1865 (28 & 29 Vict. c. 93) (see title REVENUE).

(*i*) The Treasury may direct any such accounts to be kept for a longer time, not more than seven years, for comparison with the accounts of following years.

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remain of record in the Office of Land Revenue Records and Enrolments; and rents, revenues, issues, or profits of any lands, tithes, or hereditaments specified or mentioned in the record of such accounts in the office, are to be held duly in charge by, to, or with the auditors or other proper officers of the Office of Land Revenue Records and Enrolments, and the records are to be valid and effectual (*k*).

Admissibility of copies in evidence.

266. Any document purporting to be a print or copy in print of any report to the Crown or the Houses of Parliament purporting to be made by the Commissioners or any Surveyor-General for the time being of Woods, Forests, and Land Revenues, or by any Surveyor-General of the Land Revenues of the Crown, or by the late Commissioners of Woods, Forests, Works, and Buildings (*l*), is at all times to be admissible in evidence (*m*), as the original would have been if produced from the proper custody and duly proved in evidence, provided that the document purports to have been printed by order of either House of Parliament, or has upon it words to that effect (*n*).

(9) *Management of the Foreshore.*

By the Board of Trade.

267. As from the 31st December, 1866, the management of the Crown's interest in the foreshore has (subject to certain exceptions (*o*)) been transferred from the Commissioners of Woods to the Board of Trade (*p*). This transfer includes all such ports and rights and interests of and in the shore and bed of the sea and of every channel, creek, bay, estuary, and of every navigable river of the United Kingdom as far up the same as the tide flows, as at that date belonged to the Sovereign, in right of the Crown, subject to such public and other rights as by law exist in, over, or affecting the same or any part of the same (*q*), and subject also to the following exceptions:—

Exceptions as to rivers Thames and Tees, and county palatine of Durham.

(1) The transfer is not to apply to the foreshore of the Thames (*r*), the Tees (*s*), or of the county palatine of Durham (*t*), or to any other particular portions of the foreshore with respect to which the Commissioners of Woods are by any Act specially empowered to

(*k*) As they would have been if enrolled and recorded in the office of the King's Remembrancer, or in any other office or court of record of law or equity, or with any auditors or other officers of the revenue (statute 7 & 8 Vict. c. 89, ss. 1—3).

(*l*) As to the separation of the Commissioners of Works from the Commissioners of Woods, see note (*k*), p. 123, *ante*.

(*m*) In any court of justice, or before any person having by law or consent of parties authority to hear, receive, or examine evidence.

(*n*) Crown Lands Act, 1873 (36 & 37 Vict. c. 36), s. 6.

(*o*) See the text *infra*.

(*p*) Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 7.

(*q*) *Ibid.*

(*r*) As to this, see the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.); as to agreements for rent of piers, see the Commissioners of Woods (Thames Piers) Act, 1879 (42 & 43 Vict. c. 73), and p. 207, *post*.

(*s*) As to this, see the Tees Conservancy Act, 1858 (21 & 22 Vict. c. cxli.).

(*t*) This remains under the Commissioners of Woods. See, generally, as to the foreshore in Durham, p. 114, *ante*.

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make any disposition or arrangement of or concerning the rights of the Crown therein (*a*);

(2) Or to any beds, seams, or veins of coal or stone or any metallic or other mineral substances in or under the foreshore, or to any mines or quarries thereof, which are to continue to be vested, held, and enjoyed as on the 6th August, 1866 (*b*);

Other exceptions.

(3) Or to any portion of the foreshore in relation to which any instrument was lawfully made or executed by the Commissioners of Woods or either of them prior to the 1st January, 1867 (*c*);

(4) Or to any portion of the foreshore in relation to which money was paid into the Bank of England or any other bank prior to the 1st January, 1867 (*d*);

(5) Or to any portion of the foreshore in front of or immediately adjacent to any lands of or to which the Crown, or any person or body in trust for the Crown, was seised or entitled on the 31st December, 1866, in possession, reversion, or remainder, or which, at a similar date, were the property of any Government department, or in the possession of the same or any officers of the same (*e*).

Compensation.

268. For the transfer of the Crown's interest in the foreshore so effected compensation was directed to be paid to the land revenues of the Crown, the amount to be determined by two arbitrators, appointed one by the Treasury and the other by the Commissioners of Woods, or, in case of disagreement of the latter, by an umpire appointed by the Lord Chancellor before the arbitrators entered on the reference; and the amount of the compensation so determined was directed to be made good to the land revenues of the Crown in certain ways (*f*).

(*a*) Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 17, Sched. II.

(*b*) *Ibid.*, s. 21. The management therefore remains with the Commissioners of Woods. As to the Crown's right to mines, see p. 116, *ante*.

(*c*) *Ibid.*, s. 18.

(*d*) *Ibid.*, s. 19.

(*e*) *Ibid.*, s. 20. Every such portion of the foreshore is to continue to be vested, and to be subject to the same powers, rights, and privileges, as if the Act had not been passed. Nothing contained in or done under the Act is to take away, restrict, or diminish any lawful powers or rights of the Crown to use the foreshore for purposes of salmon fishings (*ibid.*).

(*f*) *Ibid.*, s. 14. The compensation was to be made good either by the release to the land revenues of the Crown within six months after award made of any debt due therefrom to the Consolidated Fund, the release to be made by Treasury warrant; or by the transfer to the Consolidated Fund within a similar period of the charge for any pensions, annuities, or other annual payments payable out of the land revenue of the Crown, the charges so transferred to be specified by Treasury warrant, which was to be enrolled in the Court of Exchequer, now the Central Office of the High Court of Justice. On issue of the warrant the charges specified were to become charged upon the Consolidated Fund, and the land revenues of the Crown discharged therefrom. The balance, if any, of the compensation, as specified by Treasury warrant, was directed to be charged upon the Consolidated Fund and payable thereout at such periods and in such proportions as the Treasury by warrant should direct, so that the whole should be paid within ten years after the award was made. Copies of Treasury warrants made in pursuance of these provisions were directed to be laid before both Houses of Parliament. *Ibid.*, ss. 14, 15.

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Transfers from Commissioners of Woods to Board of Trade, and *vice versâ*.

269. If it appears to the Treasury, on the representation of the Commissioners of Woods and the Board of Trade, that the transfer of any foreshore (*g*) from the management of the Commissioners to that of the Board, or *vice versâ*, would be convenient for the purpose of administration, the Treasury may, by order, make such a transfer, with or without payment in respect of the same, as they think fit, subject and without prejudice to the rights and interests, if any, of any other person therein (*h*).

Any foreshore so transferred to the Board of Trade is to be subject to the like provisions and is to be dealt with as if it had been transferred in the manner stated above (*i*), and compensation had been paid therefor to the land revenues of the Crown (*k*). Any foreshore so transferred to the management of the Commissioners of Woods is to be subject to the like provisions and be dealt with as if it had been excepted from transfer to the Board of Trade under the above provisions (*l*).

Disputed claims.

270. If any claim to any foreshore on the part of the Board of Trade, the Commissioners of Woods, or the Chancellor and Council of the Duchy of Lancaster is disputed by any of those departments, the Board of Trade or the Commissioners of Woods, with the consent of the Treasury and the Chancellor and Council of the Duchy of Lancaster, may enter into an agreement for settling the dispute. Such agreement may provide for the payment to or by the Board of Trade or the Commissioners of Woods by or to the Chancellor and Council of the Duchy of Lancaster of any sum of money in satisfaction of any claim which the department to whom the money is paid may have had to the foreshore which is the subject of the agreement (*m*).

Any agreement under this provision must be executed on the part of the Chancellor and Council of the Duchy of Lancaster, under the hand and seal of the Chancellor and attested by the Clerk of the Council (*n*).

Powers of Board of Trade.

271. The Board of Trade may exercise with regard to the foreshore all the powers, authorities, rights, and privileges which the Commissioners of Woods might have exercised in relation thereto at the time of transfer (*o*), and all deeds and instruments made by the Board

(*g*) "Foreshore" in connection with this provision is to have the same meaning as in the Crown Lands Act, 1866 (29 & 30 Vict. c. 62), as to which see p. 142, *ante* (Crown Lands Act, 1906 (6 Edw. 7, c. 28), s. 11).

(*h*) *Ibid.*, s. 2 (1).

(*i*) Namely, under the Crown Lands Act, 1866 (29 & 30 Vict. c. 62).

(*k*) Crown Lands Act, 1906 (6 Edw. 7, c. 28), s. 2 (2) (a); and for the provisions, see p. 143, *ante*.

(*l*) *Ibid.*, s. 2 (2) (b).

(*m*) *Ibid.*, s. 3 (1), (2). Any money due from or received by the Board of Trade, the Commissioners of Woods, or the Chancellor and Council of the Duchy of Lancaster under this provision is to be paid or applied as if payable or received for the purchase or sale of lands (*ibid.*, s. 10).

(*n*) *Ibid.*, s. 3 (3).

(*o*) Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 8. Under s. 10 the following provisions are expressly made applicable to the Board of Trade: Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 74 (exoneration of purchasers as to application of purchase-money; see p. 153, *post*); s. 77 (exemption of grants etc.

of Trade are to be executed and signed by one of the secretaries or assistant secretaries to the Board. But no officer of the Board so executing or signing is to become personally chargeable (*p*).

272. Money received by the Board of Trade in exercise of the above powers which would have been carried by the Commissioners of Woods as annual income to the Consolidated Fund is to be paid into the Exchequer to form part of the Consolidated Fund (*q*). Money similarly received, and which would have been applied as capital by the Commissioners of Woods, is to be applied towards the reduction of the National Debt in the manner directed by Treasury minute or warrant, which must be laid before both Houses of Parliament (*r*).

Application of receipts.

273. The Board of Trade may (*s*) demise and lease (or enter into contracts or agreements for that purpose) all the estate, right, title, and interest of the Crown, in right of the Crown, in any portions of the shore of the sea or its arms or of navigable rivers, or in lands derelict or gained from the sea or its arms or navigable rivers, for a term not exceeding ninety-nine years (*t*).

Leases of foreshore.

274. Previously to commencing any work below high-water mark with respect to a harbour, port, bay, estuary, or navigable river comprised in a notice given by the Admiralty under s. 9 of the Harbours Transfer Act, 1862 (*a*), plans, specifications, and working drawings of the same must be deposited at the Admiralty office for the approval of the Admiralty (*b*); and with respect to all other parts where the tide flows, previously to commencing any work below high-water mark, such plans etc. must be deposited at the office of the Board of Trade for the approval of the Board of Trade (*c*).

Works on foreshore.

from stamp duties; see p. 154, *post*); ss. 81—85 (provisions as to receivers; see p. 139, *ante*); ss. 90—93 (distraint for and arrears of rent; see p. 165, *post*); s. 94 (disputes as to boundaries; see p. 176, *post*), except that the consent of any authority, or enrolment of any instrument required thereunder, is not to be requisite. Under s. 11 of the Crown Lands Act, 1866 (29 & 30 Vict. c. 62), the provisions, as to settlement of disputed claims, of the Crown Lands Act, 1853 (16 & 17 Vict. c. 56), s. 5, as amended by ss. 26—29 of the Crown Lands Act, 1866 (29 & 30 Vict. c. 62), are extended to the Board of Trade, except that the consent of any authority is not to be required (see pp. 155, 174, 176, *post*, for these provisions).

(*p*) Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 9.

(*q*) *Ibid.*, s. 12.

(*r*) *Ibid.*, s. 13.

(*s*) In the execution of the powers of leasing contained in the statutes recited in the preamble to the Crown Lands Act, 1845 (8 & 9 Vict. c. 99), namely, the Crown Lands Acts, 1829 (10 Geo. 4, c. 50), ss. 23, 28, 30, 61; and 1832 (2 & 3 Will. 4, c. 1); and the Crown Lands (Scotland) Act, 1833 (3 & 4 Will. 4, c. 69).

(*t*) Crown Lands Act, 1845 (8 & 9 Vict. c. 99), s. 1. When a lessee covenants and agrees to make embankments or do other acts necessary for reclaiming the land or to construct and erect wharves, docks, or other works on it to the satisfaction of the Commissioners and for the permanent improvement of the value of the land, it is not necessary for the lessee to agree or enter into a contract to erect other buildings on the land, other than as above stated. As to the registration of land below high-water mark at ordinary spring tides, see p. 177, *post*. As to leases of foreshore etc. made by the Bishop of Durham prior to the 23rd day of July, 1858, see p. 114, *ante*.

(*a*) 25 & 26 Vict. c. 69.

(*b*) Such approval must be made in writing by the Secretary of the Admiralty.

(*c*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 40. The approval

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275. If the Admiralty or the Board of Trade order a local survey and examination of an embankment or work proposed to be constructed under the powers of the Improvement of Land Act, 1864 (*d*), in, over, or affecting a tidal or navigable water or river or of the intended site of the same, the costs of the local examination are to be defrayed by the landowner (*e*).

Protection of foreshore.

One month's notice in writing of an application to register the title to land which comprises land below high-water mark at ordinary spring tides must be given to the Board of Trade before registration (*f*).

Pits, shafts, adits, drifts, levels, drains, watercourses, pools, or embankments may not be sunk, driven, or made so as to injure, weaken, or endanger, or be likely to injure, weaken, or endanger, piers or other structures on or near the foreshore (*g*).

A local authority may not take, use, or interfere with the shore or bed of the sea or of any river, channel, creek, bay or estuary, or land and hereditaments, subjects, or right of any description belonging to the Crown, in right of the Crown, without sanction (*h*).

Oyster and mussel fishery.

276. Where an order (*i*) has been made for an oyster and mussel fishery (*k*) on part of the seashore (*l*) under the management

is to be in writing under the hand of the Secretary of the Admiralty and one of the Secretaries of the Board of Trade, the work to be constructed only in accordance with such respective approval; when commenced or constructed, the same may not be altered or extended without obtaining previous consent and approval; if such work is commenced or completed, or altered, extended, or constructed, contrary to the provisions of the Act, the Admiralty or the Board of Trade, as the case may require, may abate, alter, and remove the same and restore the site to its former condition, at the cost and charge of the person or company executing the work, recoverable as a debt due from such person or company to the Crown.

The powers and duties of the Commissioners appointed under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), were transferred to the Board of Agriculture (now the Board of Agriculture and Fisheries) by the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30).

(*d*) 27 & 28 Vict. c. 114. As to the powers of the Commissioners under this Act being transferred to the Board of Agriculture and Fisheries, see note (*c*), *supra*.

(*e*) *Ibid.*, s. 41. The amount of the costs is a debt due to the Crown from the landowner, and if not paid on demand may be recovered as a debt due to the Crown, with the costs of suit, or may be recovered, with costs, as a penalty may be recoverable from the landowner.

(*f*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 66; see p. 177, *post*.

(*g*) Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 23.

(*h*) The saving of the Crown rights in general by the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), and in particular as above stated, is more fully set out at p. 205, *post*.

(*i*) Under the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), and the Acts amending the same.

(*k*) The words "oysters" and "mussels" include the brood, ware, half-ware, spat, and spawn of oysters and mussels respectively; and the expression "oyster and mussel fishery" includes a fishery for either oysters or mussels separately, and the term "oyster or mussel fishery" includes a fishery for both oysters and mussels. The provisions of the Act apply in the case of any fishery to oysters and oyster ground and beds alone, or to mussels and mussel ground and beds alone, or to both oysters and mussels and oyster and mussel ground and beds, according as the right of fishery is for oysters alone, or for mussels alone, or for both oysters and mussels (see Fisheries Act, 1868 (31 & 32 Vict. c. 45), s. 28).

(*l*) Within the meaning of the last-cited Act.

of the Commissioners of Woods or of the Board of Trade, the Commissioners or the Board of Trade, as the case may be, may grant a lease (*m*) for a term not exceeding sixty years (*n*).

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277. All persons entitled in right of or under the Crown to, or to the management of, any beds, seams, veins, mines, or quarries in or under the foreshore, or in or under any lands immediately adjacent thereto, and their respective tenants, are empowered to take into possession, or use, or pass through, over, or under, any portion of the foreshore under the management of the Board of Trade to do certain specified acts, subject to certain provisions as to notice, compensation for damage, and for the preservation of piers or other structures in or near the foreshore and the safety and accommodation of the public (*o*).

Rights of access to mines, quarries etc.

278. Nothing in the Crown Lands Act, 1866 (*a*), is to extend or be construed to extend or increase the powers or authorities, rights or privileges, of the Crown over the foreshore, or any part thereof, but as between the Crown and all other persons such powers and rights are to continue as the same existed prior to the 6th August, 1866 (*b*). The Act also contains a saving to all persons and bodies politic or corporate, and their respective representatives (other than His Majesty in right of the Crown) of all such estates, rights, titles, claims, and demands whatsoever as they respectively had on the 6th August, 1866, or might or could have had if the Act had not been passed (*c*).

Saving clause.

SUB-SECT. 4.—*The Disposition of Crown Lands before* 1829.

279. Although the disposition of Crown lands is mainly regulated by more recent enactments, which are dealt with subsequently (*d*), the Crown Lands Act, 1702 (*e*), has not been wholly repealed, and it is therefore necessary to refer to the powers of disposition thereunder. As from the 25th of March, 1702 (*f*), all

Alienation restricted.

(*m*) Of so much of the seashore under their management for a period not exceeding the duration of the rights conferred by the order and not exceeding sixty years. Any lease of seashore granted for a longer term than thirty-one years by the Board of Trade before 14th August, 1885, the date of the passing of the Crown Lands Act, 1885 (48 & 49 Vict. c. 79), in respect to a fishery comprised in an order made under the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), and the Acts amending it is valid as if granted under the Crown Lands Act, 1885 (48 & 49 Vict. c. 79).

(*n*) Crown Lands Act, 1885 (48 & 49 Vict. c. 79), s. 3. The two recitals in this section were repealed by the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22).

(*o*) Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 22.

(*a*) 29 & 30 Vict. c. 62. The provisions of the Act are given on pp. 142 *et seq.*, *ante*, and in sub-sect. 5, *post*.

(*b*) Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 25. The date is that on which the Act came into force.

(*c*) *Ibid.*, s. 31.

(*d*) See p. 151, *post*.

(*e*) 1 Ann. c. 1; stat. 1, c. 7, Ruff.

(*f*) Namely, the date of the passing of the Crown Lands Act, 1702 (1 Ann.

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grants, leases or other assurances made or granted by the Crown (*g*) of lands or other hereditaments (*h*) (advowsons of churches and vicarages only excepted) in England, Wales, or the town of Berwick-upon-Tweed, belonging to the Crown, or persons in trust for the Crown, in possession, reversion, remainder, use, or expectancy (*i*) to any person, body politic or corporate, by which any estate or interest may pass from the Crown, are void and of no effect (*k*), unless the grant, lease, or assurance is made for a term or estate not exceeding thirty-one years or three lives, or for a term of years determinable upon one, two, or three lives, and unless made to commence from the date of the making thereof; and, if the grant, lease, or assurance is made to take effect in reversion or expectancy, unless the same, together with any estates in possession, does not exceed three lives or the term of thirty-one years in the whole; and unless the tenant is liable to punishment for waste, and the ancient or most usual rent or more is reserved, or such rent as has been reserved and paid for the lands or other hereditaments for the greater part of twenty years before the making of the grant or assurance; and, where no rent has been reserved or payable, unless a reasonable rent, not being under the third part of the clear yearly value of the lands or hereditaments, is reserved; and unless the respective rents be made payable to the

c. 1; stat. 1, c. 7, Ruff.). The Act was repealed by statute 19 Geo. 3, c. 45, s. 1, so far as it related to the sale of fee farm or other rents remaining unsold by the trustees for the Crown (see as to these p. 149, *post*), or trustees within the survey or receipt of the Duchy of Lancaster (see p. 224, *post*), or to the appropriation of the money to arise by any sale or sales of the same; and also so far as it related to any manors, messuages, lands, tenements, or hereditaments, within or parcel of the honours, manors or lordships of the Duchy of Lancaster, then held by copy of court roll, or being of the nature of copyhold or customary tenure, or to any fines payable to His Majesty, his heirs or successors, upon descent or alienation of the same (see also note (*q*), p. 224, *post*, and note (*s*), p. 225, *post*).

The recital in the Crown Lands Act, 1702, s. 5 states in effect that the necessary expenses of supporting the Crown, or the greatest part of them, were formerly defrayed by a land revenue which had from time to time been impaired and diminished by grants of former Sovereigns, so that the land revenues of the Crown could then afford very little towards the support of the government but upon determination of the particular estates on which many reversions and remainders in the Crown depend or expect, and by such lands, tenements, and hereditaments as might thereafter descend, escheat, or otherwise accrue or come to the Crown. The Act was therefore passed in order that the land revenues of the Crown in fines, rents, and other profits might thereafter be increased and the burthen upon the estates of the subjects of the realm might be eased and lessened in all future provisions to be made for the expenses of the civil government. By s. 9 of the Act there is a general saving to all persons, bodies politic and corporate, of such rights, titles, estates, customs, interests, claims, and demands in or to the revenues, lands, and hereditaments as they had before the making of the Act.

(*g*) Namely, under the Great Seal of England, Exchequer seal, seals of the Duchy and County Palatine of Lancaster, or by copy of court roll or otherwise.

(*h*) Manors, messuages, lands, tenements, rents, tithes, woods, or other hereditaments.

(*i*) Whether in right of the Crown of England or as part of the Principality of Wales or of the Duchy or County Palatine of Lancaster or otherwise.

(*k*) The words "void and of no effect" must now be read as subject to the further powers of disposition given by subsequent statutes.

Crown during the whole term of the continuance of the lease or grant (*l*).

Crown may lease or grant for fifty years or three lives.

280. Where the greatest part of the yearly value of tenements or hereditaments belonging to the Crown at the time of making a lease or grant consists of buildings which may need to be repaired or re-edified, the Crown may lease or grant the same for a term not exceeding fifty years or three lives (*m*).

Grants etc. void without inquisition etc.

281. Gifts, grants, alienations, leases, and assurances made of any of the lands or hereditaments or revenues (*n*) of the Crown contrary to the provisions of the Crown Lands Act, 1702 (*o*), are void without inquisition, *scire facias*, or other proceeding to determine the same (*p*).

Restitution of forfeited estates etc.

282. The Crown Lands Act, 1702 (*q*), does not disable the Crown from making grants or restitution of estates forfeited for treason or felony, or from granting, demising, or assigning lands or hereditaments taken or seized upon outlawry, or taken in execution for debts due to the Crown; or from making grants or admittances which of right or custom ought to be made of copyhold lands or hereditaments part of a manor of the Crown; or disable trustees for sale of fee farm (*r*) and other rents from executing the trusts, powers, or other things to be done by them in accordance with the several statutes for that purpose (*s*).

Fee farm rents.

Protection from forfeiture.

283. If persons, or bodies politic or corporate, hold or possess lands or hereditaments (*t*) by original grant or lease or assignment made

(*l*) Crown Lands Act, 1702 (1 Ann. c. 1; stat. 1, c. 7, Ruff.), s. 5. None of the provisions and restrictions in this Act or in any other Acts of Parliament relating to manors, messuages, lands, tenements, leases, or hereditaments, or other real or heritable property or estate vested in or belonging to the Crown, in right of the Crown, extends to the private estates of the Sovereign (Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), ss. 2, 12. See also p. 274, *post*).

(*m*) Crown Lands Act, 1702 (1 Ann. c. 1, stat. 1, c. 7, Ruff.), s. 6. The lease or grant is to commence from the date or making of the same, or if it is made to take effect in reversion or expectancy, then so that the same, together with the estates in possession of the same tenements or hereditaments, do not exceed fifty years or three lives from such date or making; and so that the same be not made dispunishable of waste, and so that there is reserved as much rent as is required by the Act in case of a lease not exceeding thirty-one years or three lives (see p. 148, *ante*), and not otherwise. This section is repealed by statute 34 Geo. 3, c. 75, s. 1, so far as contrary to any of the provisions of that Act—that is, as to leases and grants under the Great Seal or the seal of the Exchequer. The statute 34 Geo. 3, c. 75, is itself repealed by the Statute Law Revision Act, 1861 (24 & 25 Vict. c. 101).

(*n*) See note (*f*), p. 147, *ante*.

(*o*) 1 Ann. c. 1; stat. 1, c. 7, Ruff.

(*p*) *Ibid.*, s. 7. This must be read subject to the powers and provisions of subsequent statutes.

(*q*) 1 Ann. c. 1; stat. 1, c. 7, Ruff.

(*r*) Where fee farm rents and other rents intended to be sold are described in deeds etc. by the like names as in indentures of bargain and sale, such names are sufficient for the purposes of the Pleading Act, 1711 (10 Ann. c. 28, c. 18, Ruff.), ss. 4, 5.

(*s*) Crown Lands Act, 1702 (1 Ann. c. 1; stat. 1, c. 7, Ruff), s. 8; and as to fee farm rents in the Duchy of Lancaster, see note (*f*), p. 148, *ante*, and note (*q*), p. 224, *post*.

(*t*) Manors, lands, tenements, or hereditaments.

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by the Crown (*u*) for a term of years, for life or lives, in fee simple or fee tail, or other estate upon a rent, service, or other duty reserved or payable under a condition or limitation of re-entry or cesser, or to be void in default of payment of the rent or performance of the service or duty, and if after default made the rent, service, or other duty has been answered, paid, or done to the Crown (*x*) before advantage of the forfeiture has been taken, and before a commission awarded to inquire or other process issued as to the forfeiture or non-payment of rent, in such cases no advantage is to be taken by the Crown by reason of the forfeiture (*y*), and no person claiming under the Crown may take any advantage of such default (*a*).

Former grants must be stated.

284. In grants by the Crown during pleasure of lands, tenements, offices, or any other things the determination of former grants must be stated (*b*).

Protection of purchasers of forfeited estates etc.

285. Where grants (*c*) of lands or hereditaments (*d*) had been made by letters patent of Henry VIII. and Edward VI. since the 4th of February, 1535-36, and the patentees (*e*), having sold (*f*) parts of the lands or hereditaments, had afterwards for certain considerations surrendered and given up their letters patent into the Chancery, or the letters patent had been otherwise forfeited by attainder, lost, cancelled, ymbesiled (*g*), or by other means had come into the hands of the Crown, and the enrolments of the same made void, sometimes in part and sometimes wholly, all persons, bodies politic or corporate, having any estate, right, title, interest, or possession in such lands or hereditaments from or under the patentees, or from or under the estate of others having the estate or interest of the patentees or by any other means, might make a good title by exemplification or *constat* of the enrolment of the letters patent, which was to be as valid and of the same force and effect as the original patent (*h*).

Construction of Crown grants.

286. When the Crown gives or grants lands or a manor with the appurtenances, without expressly mentioning in the deed or

(*u*) In right of the Crown or Duchy of Lancaster or otherwise.

(*x*) Into the receipt of the Exchequer or Duchy of Lancaster or Court of Wards, or to any other having authority to receive the same.

(*y*) Statute 21 Jac. 1, c. 25, s. 1.

(*a*) *Ibid.*, s. 2, notwithstanding any law, custom, or usage to the contrary.

(*b*) Statute 6 Hen. 8, c. 15.

(*c*) The words of the Act (3 & 4 Edw. 6, c. 4) are, "given granted bargained sold and exchanged to and with subjects of the realm bodies politic and corporate in fee simple fee tail for term of life or years."

(*d*) Honors, castles, manors, lands, tenements, and other hereditaments and offices.

(*e*) Their heirs, successors, or assigns.

(*f*) Bargained, sold, given, exchanged, or demised.

(*g*) *Sic.*

(*h*) Statute 3 & 4 Edw. 6, c. 4. Statute 13 Eliz. c. 6 (repealed by statute 6 Geo. 4, c. 16, s. 1) explains this statute to the effect that persons claiming lands or hereditaments under letters patent from the Crown at any time since February 4th (27 Hen. 8, 1535-36) may make a good title as above stated by exemplification or *constat* under the Great Seal of the enrolment of the letters patent or of so much of the same as may serve for the title or claim, provided the letters patent were then in force and not lawfully surrendered or cancelled.

writing knight's fees, advowsons of churches, and dowers when they fall belonging to the manor or land, the latter are reserved to the Crown (*i*).

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287. The Crown may vest in persons, bodies politic or corporate, lands for erecting, rebuilding etc. a church or chapel or mansion-house for the residence of a minister, or for a churchyard etc. (*k*).

Vesting lands for building churches etc.

SUB-SECT. 5.—*The Statutory Position of Crown Lands under the Crown Lands Acts, 1829 to 1906, and other Acts.*

(1) *In General.*

288. The Commissioners of Woods, Forests, and Land Revenues (*l*) are exempt from personal responsibility in regard to mortgages, contracts, leases, or other instruments entered into, made, taken, or executed by them (*m*), and all costs, charges, damages, and expenses incurred by them are to be paid out of the moneys received from the possessions and land revenues of the Crown (*a*).

Commissioners exempted from personal responsibility.

The Commissioners are by statute authorised to enter into contracts, but the estate remains in the Crown; on a contract entered into by them under this authority, and with the consent of the Treasury, they cannot be sued for specific performance, but the contract must be enforced in the ordinary way as in the case of estates vested in the Crown (*b*).

Specific performance of contracts.

289. No purchase or sale (except where the purchase-money does not exceed £100), and no exchange, lease, or grant, may be made by the Commissioners (*c*) without the previous authority of the

Sales etc. to be made under Treasury warrant.

(*i*) Statute Prerogativa Regis (*incert. temp.* c. 17; 17 Edw. 2, stat. 1, c. 15, Ruff.). As to grants by the Crown generally, see Vol. VI., p. 476; and as to matters affecting vendors and purchasers on sales and purchases of lands or hereditaments included in grants by the Crown, see pp. 152, 153, *post*.

(*k*) Gifts for Churches Act, 1811 (51 Geo. 3, c. 115). See p. 192, *post*. For the redemption of land tax, see p. 178, *post*.

(*l*) As to the constitution of the Commissioners, see p. 122, *ante*.

(*m*) And their heirs, executors, or administrators, and their lands, tenements, goods, and chattels with regard to the performance of covenants, conditions, or agreements in the same. As to the powers of one or two Commissioners of Woods to act, see p. 122, *ante*.

(*a*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 17. The "possessions and land revenues of the Crown" are described as all honours, hundreds, castles, lordships, manors, forests, chases, woods, parks, messuages, lands, tithes, fisheries, franchises, services, rents, and other land revenues, possessions, tenements, and hereditaments whatsoever (advowsons of churches and vicarages only excepted), belonging to the Crown and formerly within the ordering and survey of the Court of Exchequer in England or Wales, in Ireland, in the Isle of Man and its dependencies, and the Isle of Alderney, whether in possession, remainder, or reversion (Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 8). The Osborne estate forms part of the hereditary revenues of the Crown (see p. 190, *post*).

(*b*) The Commissioners are not entitled to sue, or liable to be sued, for specific performance of contracts entered into with and by them (*Nurse* v. *Seymour* (*Lord*) (1851), 13 Beav. 254); Fry on Specific Performance (1903 ed.), p. 110; Robertson, Civil Proceedings by and against the Crown, pp. 75 *et seq.* A manor is not vested in the Commissioners, but remains in the Crown (*R.* v. *Powell* (1841), 1 Q. B. 352). See p. 194, *post*. See also title SPECIFIC PERFORMANCE.

(*c*) Under the powers of the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and (*semble*) under any subsequent statutes affecting the same.

SECT. 2. Surrendered Revenues arising from Crown Lands.

Treasury, which must be signified by warrant. The authority may be given either generally for any particular class of cases or for any particular purchase, sale, exchange, lease, or grant, and either with or without any condition or restriction, as the Treasury thinks fit (*d*).

Survey to be made.

290. Before an agreement for a lease, purchase, sale, or exchange can be made or entered into by the Commissioners (*e*) a survey of the part of the possessions and land revenues of the Crown proposed to be leased, sold, or given in exchange, where the same is capable of survey, and an estimate of its value, and also, in the case of a purchase or an exchange, a like survey and estimate of the land or hereditaments proposed to be purchased or received in exchange, must be made in the manner prescribed (*f*).

When survey may be omitted.

No survey or estimate need, however, be made where from the nature of lands or hereditaments proposed to be leased, purchased, sold, or given or received in exchange, or from any circumstances relative thereto, the value cannot be ascertained by a survey or inspection; or where the value of the lands is previously known to be so inconsiderable as not to be worth the expense of taking a survey (*g*);

Confirmation of invalid sales etc. or fresh grant.

291. Where a lease, sale, exchange, or grant made before June 19th, 1829 (*h*), under the authority, or supposed authority, of any Act passed prior to that date relating to the land revenues of the Crown in England or Ireland is defective, void, or liable to be set aside by reason of the parties by whom the same purports to have been made not having been authorised to make the same; or because of the absence of a survey; or on account of the conveyance, deed, or instrument by which the lease, sale, exchange, or grant was made not having been duly enrolled; or because the provisions of the Act under which the same purported to be made had not been complied with; or by reason of the lease, sale, exchange, or grant not having been authorised by, or not being within the provisions and true intent and meaning of, the Act, the Commissioners, in case the lease or other assurance is not absolutely void, may confirm the same, either in whole or in part, and either absolutely or conditionally, and on such terms as they think fit; or, if it is absolutely void, may make a lease or grant of the lands and hereditaments for the purpose of giving any person, or body politic, corporate, or collegiate,

(*d*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 60.

(*e*) Under the powers of the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and (*semble*) under any subsequent statutes affecting the same.

(*f*) The survey and estimate is to be taken and made by a practical surveyor or surveyors (named for that purpose by the Commissioners), who must certify by a report in writing the estimated value of the lands or hereditaments surveyed and annex to the survey and estimate on oath (or, if he is a Quaker, on affirmation) in the form set out in the section (*ibid.*, s. 61). As to surveys in cases of purchases from corporations and incapacitated persons under the Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 54, see p. 160, *post*. As to Crown surveys and extents being evidence, see p. 198, *post*.

(*g*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 62. A survey is not necessary in respect of Crown lands in Ireland under certain circumstances (*ibid.*).

(*h*) The date of the passing of the Crown Lands Act, 1829 (10 Geo. 4, c. 50).

an interest therein not greater or more beneficial than the estate or interest which would have existed under the prior lease, sale, exchange, or grant, in case the same had been valid (*i*).

Validity of grants enrolled etc.

292. No person, or body politic, corporate or collegiate, claiming under deeds or instruments, by which leases, sales, exchanges, or grants have been or purport to be made by the Commissioners (*j*) and which have been duly enrolled, is bound to inquire whether the provisions of the Crown Lands Act, 1829, have been duly complied with or not, or whether the lease, sale, exchange, or grant was in fact within the Act or not (*k*), and every deed or instrument by which leases, sales, exchanges, or grants are purported to be made and duly enrolled are valid and effectual as against the Crown for the purposes for which the same were executed (*l*).

Protection of purchasers.

293. Purchasers and other persons (*m*) paying money under the Crown Lands Act, 1829 (*n*), are not bound to see to the application, or be answerable for the misapplication or non-application, of the money so paid (*o*).

Commissioners may give notices etc.

294. The Commissioners may give notices, make claims or demands, and depute or authorise any person to make an entry, which may be requisite or expedient to be given or made by or on behalf of the Crown, to compel a tenant, lessee, or occupier of possessions and land revenues of the Crown (*p*) to quit or deliver up possession, or to compel the performance of any covenant, contract, or engagement in relation thereto, or to recover possession on non-performance of any covenant, contract, or agreement, or to compel the payment of money in respect of the same, and to give any other notice, or make any other claim or demand, or depute any other person to make any other entry which may be requisite or expedient to be given or made by or on behalf of the Crown touching such possessions or land revenues (*q*).

(*i*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 46.

(*j*) Under the authority of the Crown Lands Act, 1829 (10 Geo. 4, c. 50).

(*k*) *Ibid.*, s. 73. Such persons are not bound to inquire whether the Commissioners have been duly authorised by the Treasury to make the same or not (*ibid.*, s. 60); or whether the survey required by the Act has been actually made or not (*ibid.*, ss. 61, 62); or whether, in cases of sales, exchanges, or leases in Ireland, a duplicate of the conveyance, deed, or instrument making the same has been duly transmitted to Ireland (*ibid.*, s. 70).

(*l*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 73. Whether a grant by the Crown of the foreshore and bed of a river was valid, see *Liverpool and North Wales Steamship Co., Ltd.* v. *Mersey Trading Co., Ltd.*, [1909] 1 Ch. 209, C. A. As to the confirmation of invalid leases, sales, exchanges, or grants, see p. 152, *ante*.

(*m*) Namely, any body politic, corporate, or collegiate.

(*n*) Under the authority of the Crown Lands Act, 1829 (10 Geo. 4, c. 50).

(*o*) *Ibid.*, s. 74. The provisions of this section are extended and applied, *mutatis mutandis*, to the Board of Trade by the Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 10; with the exception that such consent of any authority or the enrolment of any instrument as is in any case required by ss. 74, 77, 81—85, 90—94 of the Crown Lands Act, 1829 (10 Geo. 4, c. 50), is not requisite under the Crown Lands Act, 1866 (29 & 30 Vict. c. 62) (see also p. 127, *ante*).

(*p*) To which the Crown Lands Act, 1829 (10 Geo. 4, c. 50), relates.

(*q*) The notices, claims, or demands given or made in writing under the hands of the Commissioners (or any two of them) for any of the purposes above

SECT. 2.

Surrendered Revenues arising from Crown Lands.

295. On any sale, exchange, enfranchisement or other conveyance of the woods, forests, lands, or hereditaments of the Crown made by the Commissioners in exercise of any power conferred by the Crown Lands Acts, the conveyance may be made subject to any provisoes for making the same void, or other conditions or provisions, as they may deem expedient (*r*).

Conditions in conveyances etc.

Re-entry.

296. When a right of re-entry upon lands or other hereditaments has accrued to the Crown, the right may be exercised or enforced without inquisition being taken, or office found, or any actual re-entry being made on the premises (*s*).

Saving under Crown Lands Act, 1832.

297. All leases, deeds, contracts, and agreements made or entered into by the Commissioners or by the Surveyor-General of Works and Buildings relating to the estates and possessions of the Crown are, from and after the appointment of the Commissioners under the Crown Lands Act, 1832 (*t*), to remain in force as if the latter Act had not been passed (*a*).

Stamp duty.

298. Except where express provision to the contrary is made by the Stamp Act, 1891 (*b*), or any other Act, an instrument relating to property belonging to the Crown, or being the private property of the Sovereign, is charged with the same duty as an instrument of the same kind relating to property belonging to a subject (*c*).

Certain deeds, receipts, certificates, bonds, and other instruments made or entered into by or with the Commissioners are exempted from *ad valorem* or other stamp duty imposed by Acts in force prior to June 19th, 1829 (*d*), or by subsequent Acts, unless specially subjected thereto by any of the latter (*e*).

mentioned, and entries into or upon any of such estates or possessions, are valid and effectual and to be deemed as given and made on behalf of the Crown, any law, custom, or usage to the contrary notwithstanding (*ibid.*, s. 92). As to the application of the provisions of this section to the Board of Trade, see note (*o*), on p. 153, *ante*.

(*r*) Crown Lands Act, 1852 (15 & 16 Vict. c. 62), s. 5.

(*s*) Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), s. 25 ; the words " or her successors " in this section were repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19).

(*t*) 2 & 3 Will. 4, c. 1, under which the duties of the Surveyor-General became separated from those of the Commissioners of Woods and vested in the First Commissioner of Works and Public Buildings (see p. 133, *ante*).

(*a*) *Ibid.*, s. 9.

(*b*) 54 & 55 Vict. c. 39.

(*c*) *Ibid.*, s. 119.

(*d*) Namely, the date of the passing of the Crown Lands Act, 1829 (10 Geo. 4, c. 50).

(*e*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 77. The following instruments are exempted:—(1) Any memorandum, contract, or agreement made or entered into by or with the Commissioners of Woods under the powers and provisions of the Crown Lands Act, 1829, for the sale, purchase, or exchange of estates, manors, lordships, messuages, lands, tenements, rents, or hereditaments, or any term or interest therein, by the Commissioners; (2) any deed, receipt, or other instrument given, granted, entered into, executed, or made for the purpose of carrying into effect any sale, purchase, or exchange to be made by the Commissioners, or which are incidental to or connected with such sale, purchase, or exchange under the Act; (3) any grant by the Commissioners under the Act ; (4) any lease, or contract or agreement for lease, or counterpart

Auction duty on sales.

299. No auction duty is payable in respect of sales by auction by the Commissioners of the possessions or land revenues of the Crown, or of building materials or other goods, chattels, or effects on behalf of the Crown under the Crown Lands Act, 1829; and every such sale and the lands and hereditaments or other property or effects sold, and the auctioneer, so far as respects the sale, are exempt from rates or duties imposed on sales by auction by statutes before June 19th, 1829 (*f*), and from rates and duties imposed by subsequent statutes, unless the same are specially imposed (*g*).

Settlement of disputed claims.

300. The Commissioners, or any of them, may, with the consent of the Crown, signified in writing under the Royal Sign Manual, and by warrant from the Treasury, make arrangements for the adjustment or settlement of doubtful or disputed rights or claims of the Crown to real or personal property or forestal rights, the management of which would, if such rights or claims were established in favour of the Crown, be vested in or devolve upon the Commissioners.

In making these arrangements the Commissioners (with the above-mentioned consents) may either give up or relinquish such rights or claims of the Crown, or accept, on behalf of the Crown, lands, tenements, or hereditaments, or sums of money, in lieu and satisfaction of any rights or claims generally; and also may agree for the payment to any person of rents or other profits to be derived from, or purchase-moneys to be received on account of, the sale of such real or personal property or forestal rights.

Any person claiming to be entitled in possession, either for life or for a greater estate, to, and to the rents and profits, or the interest or income or the use and enjoyment of, such real or personal property or forestal rights, may enter into agreements with the Commissioners (*h*).

of lease; (5) any appointment of officers made by the Commissioners; (6) any certificate for gamekeepers appointed; (7) any bond given by or for a receiver or other officer or agent from or for whom security may be required by the Commissioners.

The provisions of this section are extended and applied, *mutatis mutandis*, to the Board of Trade by the Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 10. See note (*o*) p. 144, *ante*.

As to stamps on grants of franchises and liberties, see Vol. VI., p. 493.

As to licences or waivers of forfeiture or power of re-entry reserved in leases given by the Commissioners of Woods by memorandum in writing without stamp, see note (*m*), p. 166, *post*.

(*f*) Namely, the date of the passing of the Crown Lands Act, 1829 (10 Geo. 4, c. 50).

(*g*) *Ibid.*, s. 78. The Auctioneers Act, 1845 (8 & 9 Vict. c. 15), in its preamble recites certain statutes (now repealed), and by s. 2 enacts that after May 8th, 1845 (the date of the passing of the Act), the provisions relating to duties then payable in respect of auctions or sales by auction are repealed and a new duty on the licence to be taken out by auctioneers is imposed. This section was repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66). Ss. 2, 3, and the schedule of this latter Act were repealed by the Statute Law Revision Act, 1894 (57 & 58 Vict. c. 56). S. 1 of the Auctioneers Act, 1845 (8 & 9 Vict. c. 15), is not included in the repeal of enactments in this schedule. See also title AUCTION AND AUCTIONEERS, Vol. I., p. 500.

(*h*) Crown Lands Act, 1853 (16 & 17 Vict. c. 56), s. 5. When a deed, agreement, or writing effecting the arrangement is enrolled in the Office of Land

SECT. 2. Surrendered Revenues arising from Crown Lands.

Saving of rights under Crown Lands Act, 1829.

301. Nothing in the Crown Lands Act, 1829, affects the rights of the Crown, or of the Lord High Treasurer, or of the Commissioners of the Treasury, or the Chancellor of the Exchequer, or a grantee of the Crown, in respect of any appointment usually made by them, or the right of appointment of keepers (*i*) or other officers in the royal forests, so long as the right is vested in any warder or ranger of such forests, or the privileges or advantages enjoyed or claimed under letters patent granted by the Crown, or its predecessors, of any office, bailiwick, walk, or lodge, within the royal forests (*k*).

Under Improvement of Land Act, 1864.

302. The Improvement of Land Act, 1864 (*l*), does not authorise persons to purchase, take, use, or interfere with, or the Inclosure Commissioners (*m*) to make an order with respect to, land, soil, or water, or any right in respect of the same, belonging to the Crown, in right of the Crown, without the previous consent in writing of the Commissioners of Woods or the Commissioners of Works as the case may be (*n*).

Proof of Crown grant.

303. A grant from the Crown is proved by production of the original under the Great Seal, or the Royal Sign Manual (*o*), or by exemplifications or examined copies, or, under the Evidence Act, 1851 (*p*), by certified copies (*q*). If the original cannot be produced, and the vendor's solicitor informs the purchaser where the grant

Revenue Records and Enrolments, it is binding on all parties interested, and is evidence that the arrangement is authorised by the Act, and that the provisions of the latter have been complied with.

As to the provisions relating to the discharge of debts or sums of money due either to the capital or the income of the hereditary land revenues of the Crown under the management of the Commissioners of Woods, and as to the arrangement of disputes where proceedings at law or in equity have been commenced, see p. 130, *ante;* as to the power of the Board of Trade etc. to settle disputes as to foreshore, see p. 144, *ante;* as to settlement by arbitration, see p. 175, *post.*

(*i*) Master-keepers or under-keepers.

(*k*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 135. The section extends to forests to which the Act, and (*semble*) any subsequent statutes affecting the same, relate.

(*l*) 27 & 28 Vict. c. 114.

(*m*) By "the Commissioners" is meant in this Act (see the interpretation in s. 2), as regards lands in Great Britain, the Inclosure Commissioners for England and Wales [now the Board of Agriculture and Fisheries; see the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2 and Sched. I., and the Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31), s. 1], and as regards lands in Ireland, the Commissioners of Public Works in Ireland under the Public Works (Ireland) Act, 1831 (1 & 2 Will. 4, c. 33), and the Drainage (Ireland) Act, 1842 (5 & 6 Vict. c. 89), and the several Acts amending the same.

(*n*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 35. The rights, powers, or estates of the Crown, in right of the Crown, are not diverted, altered, or affected by the Act (*ibid.*). As to the power of the Treasury to direct the cost of improvements of Crown lands to be charged to the capital of the land revenues of the Crown and repaid out of income, see p. 127, *ante;* as to compensation payable in respect of improvements under the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), see p. 191, *post;* as to the consent of the Admiralty and Board of Trade with regard to the foreshore under the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), see p. 145, *ante.*

(*o*) 2 Bl. Com., 14th ed., p. 346.

(*p*) 14 & 15 Vict. c. 99, s. 14.

(*q*) Williams, Vendor and Purchaser, Vol. I., pp. 101, 121; Taylor on Evidence, 10th ed., s. 1102.

can be found, the purchaser, it seems, is not entitled to a copy, but must have it examined at the office where it is kept (*r*).

304. A purchaser from the Crown is not entitled to covenants for title (*s*); nor can a right of light be established against the Commissioners or against their lessee (*t*).

(2) *Sales and Purchases.*

Commissioners may sell.

305. The Commissioners of Woods, Forests and Land Revenues may sell to persons, and bodies politic, corporate or collegiate, the possessions and land revenues (*u*) of the Crown (*a*), not being part of the royal forests, parks, or chases (*b*) in England, subject to the consent of the Treasury in certain cases (*c*).

Upon a contract or agreement for the sale of a part of the possessions and land revenues of the Crown (*d*) being entered into, the purchaser must, if the purchase-money amounts to £100, pay it into the Bank of England (*e*); but if it does not amount to £100 the purchaser may either pay it into the Bank of England or Bank of Ireland or to the Commissioners or their receivers or agents (*f*).

Upon payment of the purchase-money the Commissioners must execute a conveyance to the purchaser under their hands and seals and give a receipt (*g*).

(*r*) Sugden, Vendor and Purchaser, 14th ed., p. 431; Dart, Vendor and Purchaser, Vol. I., 7th ed., p. 354. As to grants from the Crown generally, see Vol. VI., pp. 476 *et seq.*

(*s*) Sugden, Vendor and Purchaser, 14th ed., p. 575. As to how far covenants and stipulations in leaseholds are binding as regards the Crown after escheat, see Co. Litt. 215 a; Shep. Touch. 150. As to the general practice affecting vendors and purchasers of Crown lands, see title SALE OF LAND.

(*t*) *Wheaton* v. *Maple & Co.*, [1893] 3 Ch. 48, C. A.; and see Vol. VI., p. 485.

(*u*) As to what the term "possessions and land revenues of the Crown" comprises, see p. 151, *ante*.

(*a*) To which the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and, *semble*, any subsequent statutes affecting the same relate.

(*b*) As to the provisions relating to the royal forests, see p. 181, *post*.

(*c*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 34. Where the consent of the Treasury is required it is so stated in the text or notes, as the case may be. As to the powers of trustees for life, trustees for incapacitated persons etc. to purchase Crown lands, see p. 160, *post*. As to the exemption from *ad valorem* or other stamp duty on deeds, receipts, or other instruments for the purpose of carrying into effect any sale, purchase, or exchange made by the Commissioners, see p. 154, *ante*. No auction duty is payable in respect of sales by auction by the Commissioners of Crown lands, or of building materials or other goods, chattels, or effects on behalf of the Crown (see p. 155, *ante*).

(*d*) To which the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and, *semble*, any subsequent statutes affecting the same relate (not being a subsisting lease which may have been purchased or taken as mentioned in that Act).

(*e*) Or if the hereditaments purchased are situated in Ireland, then either into the Bank of England or the Bank of Ireland at his option. The cashiers of the Bank of England or the Bank of Ireland, as the case may be, upon the production of a note signed by the Commissioners of Woods stating the sum to be paid to their account, must accept the same and carry it to the account of the Commissioners and give a receipt for it without fee or reward.

(*f*) Appointed by them for that purpose.

(*g*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 35. The forms of the conveyance or receipt are to be either in the forms set out in the schedule to the Crown Lands Act, 1829 (10 Geo. 4, c. 50), or in any other form deemed more

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306. On the sale (*h*) of quit rents or other rents the conveyance must express whether they are to be extinguished or to be held and enjoyed by the purchaser or his trustee; and in the former case immediately upon the execution of the conveyance the rent becomes extinguished, and in the latter case it becomes vested in and payable to the purchaser (*i*).

Conveyance of rents sold.

Power to sell interest of Crown.

307. Where in an action or other proceeding (*j*) it appears to the court that the Crown is entitled to an hereditament, corporeal or incorporeal, or to an estate or interest, legal or equitable, the court may (*k*) order a sale of the hereditament, estate, or interest (*l*).

Release from covenants.

308. The Commissioners, with the consent of the Treasury, may release, by licence or waiver in writing, from any covenant, condition, or agreement contained in a grant or other conveyance (*m*).

Commissioners may purchase.

309. The Commissioners may purchase, on behalf of the Crown, lands or hereditaments (*n*) in fee simple, or copyhold lands or hereditaments (*o*) the freehold of which is in the Crown, or rents, pensions, annuities, fuel rights, rights of common, or other charges or rights, whether in fee simple or not, which are issuing out of or charged upon or extend over the possessions and land revenues of the Crown (*p*).

convenient. The conveyances and receipts must be attested, as to their execution and signature by a commissioner, by at least one witness, and the conveyance passes all the estate, right, and interest of the Crown to the purchaser for such estate, to such use, upon such trusts, and to such intents and purposes (if any) as by the conveyance or by reference therein to any other instrument or deed is expressed concerning the same.

(*h*) Under the authority of the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and, *semble*, any subsequent statutes affecting the same.

(*i*) And his trustee, or his heirs or successors and assigns (*ibid.*, s. 36), the quit rent or other rent being payable half-yearly on March 25th and September 29th in every year and recoverable by distress and by impounding and selling the goods, chattels, or effects distrained, as in the case of rent-charges.

(*j*) In the High Court of Justice or in the Court of Chancery of the County Palatine of Lancaster.

(*k*) On the application or with the consent of the Attorney-General, notwithstanding that no office has been found and no commission issued or executed.

(*l*) Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 5 (1); and see *Re Pratt's Trusts*, [1886] W. N. 144. The portion of the net proceeds of sale representing the interest of the Crown must be paid, invested, transferred, sold, or disposed of in manner provided by s. 4 of the Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18). Sub-s. 2 of s. 5 of the Intestate Estates Act, 1884, directs that s. 1 of the Trustee Act, 1852 (15 & 16 Vict. c. 55), applies on such sales as if the estate or interest of the Crown comprised in the sale were vested in a subject. S. 1 of the latter Act was repealed by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 51 and schedule; see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38 (1). As to the effect of the incorporation of a repealed statute in a subsequent unrepealed statute, see title STATUTES. As to escheat of real estate, see titles CROWN PRACTICE; REAL PROPERTY AND CHATTELS REAL.

(*m*) See p. 167, *post*.

(*n*) Manors, lordships, messuages, lands, tenements, or hereditaments.

(*o*) As to the provisions relating to the purchase, under the Crown Lands Act, 1841 (5 Vict. c. 1), s. 5, of copyhold lands adjoining to, or desirable to be held with, freehold hereditaments of the Crown, see p. 194, *post*.

(*p*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 52. The form of conveyances of lands or hereditaments so purchased are to be similar to conveyances to the

SECT. 2. Surrendered Revenues arising from Crown Lands.

310. The Commissioners may take leases of lands or hereditaments (*q*), and enter into contracts and agreements for that purpose, on behalf of the Crown from any persons and bodies politic, corporate, or collegiate for a period, at a rent, and with or without a fine, and subject to covenants, conditions, and provisions and on terms, as the Commissioners think proper (*r*). They may also purchase subsisting leases or terms of years of such lands or hereditaments, whether part of the possessions and land revenues of the Crown or not (*s*), and enter into like contracts and agreements (*t*); and may cause the leases (*u*) purchased or taken in exchange to be granted or assigned to trustees for the Crown, who are to be indemnified by the Commissioners from the rents and covenants to be paid or observed by the lessees (*v*).

And take leases.

311. Where a subsisting lease of any part of the possessions and land revenues of the Crown (*w*) is purchased or taken in exchange by the Commissioners (*x*), the Commissioners may either cause the same to be surrendered to the Crown, in order that the residue of the term for which the lease was granted may merge in the inheritance and become extinguished, or cause the same to be assigned to trustees for the Crown in order that the same may be kept on foot distinct from the inheritance (*y*).

Surrender etc. of purchased leases.

312. The powers of sale and exchange given to the Commissioners (*z*) extend to enabling them to sell or exchange leases purchased or taken, or which have been contracted for under any of the Acts repealed by the Crown Lands Act, 1829, and which have not been surrendered and merged (*a*).

Leases may be sold or exchanged.

Crown of lands and hereditaments received in exchange as stated in note (*k*), p. 169, *post*. Any hereditaments so purchased not becoming extinct by the conveyance or surrender, on completion of the purchase, become part of the possessions and land revenues of the Crown and subject to the same provisions, powers, and authorities in every respect, including the powers and provisions of the Crown Lands Act, 1829 (10 Geo. 4, c. 50).

(*q*) Manors, messuages, lands, tenements, or hereditaments.

(*r*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 47.

(*s*) To which the Crown Lands Act, 1829 (10 Geo. 4, c. 50), or, *semble*, any subsequent statutes affecting the same relate.

(*t*) *Ibid.*, s. 48.

(*u*) Not being a lease of any part of the possessions and land revenues of the Crown to which the Act relates.

(*v*) *Ibid.*, s. 49. The representatives of the trustees are to be included in the indemnity.

(*w*) To which the Crown Lands Act, 1829 (10 Geo. 4, c. 50), or, *semble*, any subsequent statutes affecting the same relate.

(*x*) Or has been contracted for under any of the statutes repealed by that statute.

(*y*) *Ibid.*, s. 50.

(*z*) By the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and, *semble*, any subsequent statutes affecting the same.

(*a*) *Ibid.*, s. 51. Upon a contract or agreement for sale of a lease purchased or taken under this section (s. 51) being entered into by the Commissioners with any person or body politic, corporate, or collegiate, under the authority of this Act, the purchaser of such lease must pay the purchase-money as directed with respect to other parts of the possessions and land revenues of the Crown (see p. 157, *ante*). The Commissioners on a sale of such lease will, on the

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Incapacitated persons may sell.

313. Bodies politic or corporate, ecclesiastical or civil, and trustees possessed of or entitled to leases or terms of years, or manors, lordships, messuages, lands, tenements, hereditaments, rents, pensions, annuities, or other charges or rights (*b*), and tenants for an interest short of an absolute interest in the same, and guardians or committees of infants, lunatics, idiots, or other incapacitated persons interested therein, may contract and agree with the Commissioners for the sale of the same, and assign, release, convey, or surrender the same accordingly (*c*).

Premises must be surveyed.

314. Where a purchase is made by the Commissioners from bodies politic, corporate, or collegiate, or persons under disability or incapacity as aforesaid or not having power to sell, except under the provision hereinbefore stated, the value of the property purchased must be ascertained by two practical surveyors, one of whom is to be nominated by the Commissioners and the other by the vendors, and if the two surveyors do not agree in the valuation, then by a third surveyor nominated by them for that purpose (*d*).

Application of purchase-money.

315. When a purchase is made from bodies politic, corporate, or collegiate, or persons under disability or incapacity, or not having power to sell (*e*), and the purchase-money amounts to £50, it must be paid into the Bank of England (*f*) to the account of the Paymaster-General, *ex parte* the Commissioners of Woods, without fee or reward (*g*), if the property purchased is situate in

production of the receipt either of the Bank of England or the Bank of Ireland for the purchase-money, or, if the same does not amount to £100, then either on the production of the receipt or on the payment to them, their receiver or agent, of the purchase-money, or, in case of an exchange, on the conveyance or assignment of the lands and hereditaments to be received in exchange being executed, cause the trustees in whom such lease is vested to assign the same to the purchasers or as they direct.

Such assignments are valid and effectual, and the parties claiming under them hold the leases discharged from any trust for the Crown.

The Commissioners by such assignment, or by a separate instrument, at the option of the purchaser, in case of a sale, acknowledge the payment of the purchase-money.

(*b*) Which the Commissioners of Woods may be desirous of purchasing under the powers of the Crown Lands Act, 1829 (10 Geo. 4, c. 50).

(*c*) *Ibid.*, s. 53. Such contracts, agreements, assignments, releases, conveyances, and surrenders are to be as valid and effectual as if the same were made by persons absolutely entitled to the property sold, and under no disability or incapacity.

(*d*) *Ibid.*, s. 54. As to the form of the oath or affirmation to be annexed to the survey, estimate, or valuation, when completed, and as to the provisions relating to surveys to be made previously to leases, purchases, sales, or exchanges and the cases in which surveys may be omitted, see p. 152, *ante*.

(*e*) Except under the provisions of the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and, *semble*, any subsequent statutes affecting the same.

(*f*) With all convenient speed and with the privity of the Accountant-General of the Court of Exchequer [now the Paymaster-General; see Court of Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44), s. 4].

(*g*) The money is to be applied under the direction of the court by order made upon petition to be preferred in a summary way or otherwise as the court thinks fit, and in such manner as the court thinks just and equitable, for the benefit of the parties interested in or entitled to the property, and until so

England or Wales, or into the Bank of Ireland if situate in Ireland; but if the purchase-money does not amount to £50 it is to be applied as the Commissioners of Woods think fit for the benefit of the parties interested in such property (*h*).

Where questions arise touching the title of persons to money to be paid into the Bank of England (*i*) or Bank of Ireland, or to Bank annuities to be purchased with such money, or dividends or interest on the Bank annuities, the persons who are in possession of the property so purchased at the time of the purchase are deemed to be entitled to the property, according to such possession, until the contrary is shown (*j*).

Purchase-money of leasehold interests.

316. If the Commissioners (*k*) purchase a leasehold interest in Crown land (*l*), the purchase-money paid for it out of the capital money of the land revenues of the Crown is to be repaid out of the income of such land revenues by such equal annual instalments as will replace the capital money without interest within the period of forty years (*m*).

The Commissioners may also purchase such leasehold interests in consideration wholly or partly of an annuity for a period not exceeding forty years (*n*). Those having power to sell such interests may, unless expressly prohibited by the terms of the settlement, sell the same for such consideration (*o*).

(3) *Leases.*

Commissioners may grant leases:—

317. The Commissioners of Woods, subject to the consent or approval of the Treasury in certain cases (*p*), may demise and lease, and enter into any contract or agreement for demising and leasing, to any person or body politic, corporate, or collegiate (*q*), any part

applied the money, by order of the court, is to be invested by the Paymaster-General in his name respectively in the purchase of consolidated or reduced bank Annuities, and the dividend on or annual produce of the same is to be paid, by order of the court, to the persons who would have been entitled to the rents and profits of the property sold.

(*h*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 55.

(*i*) In accordance with the directions of the Crown Lands Act, 1829 (10 Geo. 4, c. 50), or, *semble*, any subsequent statutes affecting the same.

(*j*) To the satisfaction of the High Court of Justice. The dividends or interest on the Bank annuities to be purchased with such money, and also the capital of the Bank annuities, must be paid, applied, and disposed of accordingly, unless it is made clear to the court that the possession or receipt was wrongful, and that some other person was entitled to the property (*ibid.*, s. 56).

(*k*) In exercise of the powers conferred by the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and, *semble*, any subsequent statutes affecting the same.

(*l*) Under their management.

(*m*) From the date when the purchase takes effect, or within the unexpired period of the term for which the lease was granted, whichever period is shorter.

(*n*) Or the unexpired term for which the lease was granted, whichever period is shorter.

(*o*) Crown Lands Act, 1894 (57 & 58 Vict. c. 43), s. 4.

(*p*) The cases in which the consent or approval of the Treasury is required are stated at pp. 192, 201, 203, *post*; and see note (*a*), at p. 188, *post*.

(*q*) Where the words "ecclesiastical or civil" are used, it is so stated in the text or notes.

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of the possessions and land revenues (*r*) of the Crown (*s*) as follows:—

(1) On occupation leases for a term not exceeding thirty-one years from the time of making the lease or agreement for a lease (*t*):

For thirty-one years;

(2) On leases for a term not exceeding ninety-nine years from the time of making the lease or agreement for a lease of the following classes of property (*a*); (a) tenements or hereditaments the greater part of the yearly value of which at the time of making the lease or agreement for a lease consists of buildings (*b*); (b) land or ground proper for the erection of houses or other buildings thereon with or without gardens, yards, curtilages, or other appurtenances to be used therewith, and where the lessee or intended lessee covenants or agrees to erect a building or buildings thereon of greater yearly value than the land or ground (*c*); (c) land or ground proper for gardens, yards, curtilages, or other appurtenances, to be used with any other house or building erected or to be erected on ground belonging either to the Crown or other proprietor, or proper for any other purpose calculated to afford convenience or accommodation to the occupiers of such house or building (*d*).

For ninety-nine years of certain buildings etc.

Leases for gardens.

But no such land or ground belonging to the Crown, authorised (*e*) to be demised for a term not exceeding ninety-nine years, may be demised or agreed to be demised for any term which extends beyond the duration of the subsisting lease or leases of the house or building to which the same is intended to be attached (*f*):

Leases of *præ* and *post* fines etc.

(3) Leases of *præ* and *post* fines in Wales and Chester, of profits of tolls, markets and fairs, tithes, fisheries, ferries, and other articles of uncertain produce, may be granted by the Commissioners at a rent only, or at a rent and for a fine as they may think proper (*g*):

(4) Certain leases may be granted under statutory powers existing before the year 1829 (*h*):

(*r*) As to what is comprised in the expression "possessions and land revenues" of the Crown, see note (*a*), p. 151, *ante*.

(*s*) To which the Crown Lands Act, 1829 (10 Geo. 4, c. 50), or, *semble*, any subsequent statutes affecting the same relate. These powers do not extend to the leasing of the royal forests, parks, or chases in England or any part of them (Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 25). As to the powers of leasing parts of the royal forests etc., see p. 186, *post*; as to the royal parks, see p. 133, *ante*.

(*t*) *Ibid.*, s. 22. As to the general provisions relating to leases, see p. 163, *post*.

(*a*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 23. This proviso is in effect recited in the preamble to the Crown Lands Act, 1845 (8 & 9 Vict. c. 99). With regard to the rents and other general provisions to be reserved and contained in these leases, see p. 163, *post*.

(*b*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 23.

(*c*) *Ibid.* As to the general provisions relating to building leases, see p. 164, *post*.

(*d*) *Ibid.*

(*e*) Authorised under the provisions above mentioned.

(*f*) Crown Lands Act, 1829 (10 Geo. 4, c. 29), s. 24.

(*g*) *Ibid.*, s. 32.

(*h*) See p. 147, *ante*.

(5) Leases may also be granted of land for Agricultural Holdings and Small Holdings and Allotments (*i*): (6) Foreshore (*k*): (7) Royal forests (*l*): (8) Lands for Military purposes (*m*): (9) Minerals and mines (*n*): (10) Parks (*o*).

318. The following general provisions are to be observed in granting leases (*p*) :—

General provisions as to leases

Leases under the Crown Lands Acts, 1829 and 1845, may be either in possession or in reversion, subject to any existing lease, or by way of future interest, and subject to certain conditions (*q*).

Rents.

The rents are to be reserved and made payable to the Crown free and clear of all manner of taxes and assessments whatsoever (*r*).

The clear yearly rent to be reserved and made payable during the whole of the term granted is to be such as appears to the Commissioners a reasonable rent or consideration for the lease (*s*), without taking a fine for the same (*t*), except that in estimating the amount of rent to be reserved on a lease the surrender of an existing lease of the property comprised in the lease to be so granted, or any part of the same, may be taken into consideration by the Commissioners; and the acceptance of such surrender is not to be considered as taking a fine within the meaning of the last-mentioned provision (*a*).

Re-entry.

Leases (*b*) must contain a proviso or condition for re-entry on non-payment of rent or non-observance or non-performance of covenants by the lessees (*c*).

Counterpart.

The lessees named in the leases must execute a counterpart of the same (*d*).

(*i*) See p. 191, *post*.
(*k*) See p. 145, *ante*.
(*l*) See p. 186, *post*.
(*m*) See p. 201, *post*.
(*n*) See p. 203, *post*.
(*o*) See p. 133, *ante*.
(*p*) These provisions are enacted by the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and extended to leases made under the Crown Lands Act, 1845 (8 & 9 Vict. c. 99), by the latter Act; see note (*a*), p. 162, *ante*.
(*q*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 26. Such leases are not to extend beyond thirty-one years, or, in the case of leases for ninety-nine years, such lease must not be made for a term which will extend beyond ninety-nine years from the time when such lease is made, or if made in pursuance of a previous agreement, then from the time when such agreement was made.
(*r*) *Ibid.*, s. 27.
(*s*) Granted under the powers given by the Crown Lands Act, 1829 (10 Geo. 4, c. 50), or, *semble*, under any subsequent statutes affecting the same.
(*t*) *Ibid.*, s. 28. This proviso is also inserted in the preamble to the Crown Lands Act, 1845 (8 & 9 Vict. c. 99).
(*a*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 29. As to the surrendering of leases generally, see p. 165, *post*.
(*b*) Granted under the Crown Lands Act, 1829 (10 Geo. 4, c. 50), or, *semble*, under any subsequent statutes affecting the same.
(*c*) *Ibid.*, s. 27. As to the power of the Crown to re-enter on lands or hereditaments without inquisition being taken or actual re-entry being made on the premises, see p. 154, *ante*, and Vol. VI., p. 496.
(*d*) *Ibid.*

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Lessees may not be made dispunishable for waste, except in leases of mines, minerals, quarries, or collieries, and in leases (*e*) for a term not exceeding ninety-nine years, in which leases the lessees may be made dispunishable for waste if the Commissioners think proper (*f*).

Building leases for ninety-nine years; a nominal rent during first three years.

319. In leases for a term not exceeding ninety-nine years of lands or hereditaments where at the time of granting the lease (*g*) there is no substantial building upon the land or ground to be demised, and the lessees agree to erect buildings of greater yearly value than the land or ground demised or agreed to be demised, the Commissioners may reserve, during a period not exceeding the first three years of the term granted, a nominal rent, or such other rent only as they may think fit (*h*).

Fine in lieu of part of rent.

320. In such leases to be granted for a term not exceeding ninety-nine years of lands or hereditaments, where at the time of granting such leases, or (if the leases are granted in pursuance of a previous agreement) at the time when the agreement was made, there are substantial buildings upon the lands or hereditaments to be demised, which are not required or intended or agreed to be rebuilt, the Commissioners may take a fine on the granting of such lease, but such fine is not to be taken in lieu of a further part than one-third of such annual sum as appears to them as a reasonable rent or consideration for such lease in case no fine had been taken, the remainder of the annual sum being reserved by way of rent (*i*).

One or separate rents in building leases for ninety-nine years.

321. Since the 4th of August, 1845 (*k*), the Commissioners (with regard to land authorised by the Crown Lands Act, 1829, or the Crown Lands Act, 1845, to be let, or agreed to be let, for a term not exceeding ninety-nine years for building purposes, where the lessees agree to erect buildings thereon (*l*), may either reserve one uniform rent in respect of the same, or may reserve separate rents for separate parts of the term demised, or agreed to be demised, varying in such manner as is determined on by the

(*e*) Made under the powers of the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and, *semble*, any other subsequent statutes affecting the same.

(*f*) *Ibid.*, s. 27. As to mining leases generally, see p. 203, *post*.

(*g*) Or, if such lease is granted in pursuance of a previous agreement, at the time when such agreement was made.

(*h*) *Ibid.*, s. 30. This proviso is recited in the preamble to the Crown Lands Act, 1845 (8 & 9 Vict. c. 99).

(*i*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 31. The amount of the fine is not to be less than the sum to which the portion of the annual sum in lieu of which it is to be taken would have amounted during the term to be granted, deducting a discount, computed by way of compound interest, at no higher rate than the highest legal rate of interest in England, if the property to be demised is in England or Wales. As to leases of *præ* and *post* fines in Wales and Chester, profits of tolls etc., see p. 162, *ante*; as to the reservation of rent in leases of mines, see p. 203, *post*.

(*k*) The date of the passing of the Crown Lands Act, 1845 (8 & 9 Vict. c. 99). S. 3 of this Act was repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), schedule.

(*l*) See par. 319, *supra*.

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Commissioners of Woods, instead of one uniform rent during the said term (*m*).

Recovery of arrears of rent.

322. A lessee, occupier, or tenant of possessions or land revenues (*n*) of the Crown (*o*), at an annual rent payable to the Crown exceeding £50, being in arrear of rent, or holding in his custody any rent or mesne profits or other profits or produce due or belonging to the Crown (*p*) for three calendar months after application for payment (*q*), must pay interest at the rate of 5 per cent. upon the sums so in arrear (*r*). Such interest may be added to the rent etc. so in arrear, and is recoverable by distraint on the part of receivers (*s*), together with the costs and expenses of such recovery (*t*).

Arrears may be compounded for.

323. Arrears of rent due or owing to the Crown in respect of the possessions and land revenues of the Crown may, with the consent of the Treasury, be compounded for or agreed upon by the Commissioners, where they deem it expedient, with any person.

The payment of a sum of money so agreed upon is a bar to any action by the Crown for recovery of such arrears of rent so compounded for (*a*).

Commissioners may accept surrender etc.

324. The Commissioners, in the execution of the powers contained in the Crown Lands Act, 1829 (*b*), may accept a surrender of any lease of the possessions or land revenues of the Crown, and may grant separate leases of the hereditaments so surrendered, for the residue of the term for which the surrendered hereditaments were held, and may apportion the rent reserved by the surrendered lease as they think fit (*c*).

(*m*) Crown Lands Act, 1845 (8 & 9 Vict. c. 99), s. 4. All leases, or agreements for leases, authorised by the Crown Lands Act, 1829 (10 Geo. 4, c. 50), or the Crown Lands Act, 1845 (8 & 9 Vict. c. 99), are to be made and entered into in the manner and subject to the provisions of the Crown Lands Act, 1829, except so far as altered or extended by the Crown Lands Act, 1845.

(*n*) As to what is comprised under "possessions and land revenues," see p. 151, *ante*.

(*o*) To which the Crown Lands Act, 1829 (10 Geo. 4, c. 50), or, *semble*, other subsequent statutes affecting the same relate.

(*p*) Arising from any part of such possessions or land revenues.

(*q*) Without paying over the same to the receiver authorised to receive it. The application may be either personally or by letter from such receiver.

(*r*) The interest is calculated from the day the sum became due to the time the same is actually paid.

(*s*) For the procedure of receivers empowered under the Crown Lands Act, 1829 (10 Geo. 4, c. 50), see p. 139, *ante*.

(*t*) *Ibid.*, s. 91. As to the provisions of this section being extended to the Board of Trade, see note (*a*), *infra*.

(*a*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 93. Notwithstanding any Act, law, or usage to the contrary. The provisions of this section are extended and applied, *mutatis mutandis*, to the Board of Trade by the Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 10, with the exception that the consent of any authority or enrolment of an instrument as is required by ss. 74, 77, 81—85, 90—94 of the Crown Lands Act, 1829, is not requisite under the Crown Lands Act, 1866.

(*b*) 10 Geo. 4, c. 50.

(*c*) Crown Lands Act, 1845 (8 & 9 Vict. c. 99), s. 6. Leases made before the 4th of August, 1845 (the date of the passing of the Crown Lands Act, 1845), on any such surrender, and which might have been made if the Act had passed

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325. When a surrender is made of an existing lease for the purpose of taking a new lease by virtue of the Crown Lands Act, 1845 (*d*), the new lease is taken to be a renewal of the surrendered lease within the scope and meaning of the 6th section of the Landlord and Tenant Act, 1730 (*e*), so far as to render unnecessary the surrender of any underleases previously to the granting of such new lease, and to give full effect to such new lease in all respects, notwithstanding any underlease may not be surrendered (*f*).

To render surrender of underlease unnecessary.

New lease to operate as surrender.

326. Where any person, in whom property belonging to the Crown is vested under a lease, accepts a new lease of the property, either to begin presently or at any time during the continuance of the existing lease, the acceptance of the new lease, as from the commencement of the term of the new lease, but subject to anything to the contrary expressed in the new lease, operates as a surrender of the existing lease as to so much of the property demised thereby as is demised by the new lease, but without prejudice to any rights or liabilities existing at the date of the surrender (*g*).

Buildings erected in ignorance of title of Crown.

327. When leases are granted, or agreements entered into for leases after the 4th of August, 1845 (*h*), of land or ground, on which any persons to whom such leases may be granted, or with whom such agreements may be entered into, may have erected buildings which, in the opinion of the Commissioners, were erected in ignorance of the Crown's title to such land, such leases may be granted or agreements entered into (*i*), but without reference to or taking into consideration the value of the buildings so erected, and with reference only to the value of the land for building ground, either at the time of the erection of such buildings or at the time of granting the said lease or of entering into the said agreement, as the said Commissioners may think fit (*k*).

Licence or waiver of forfeiture.

328. Where any licence or waiver of any forfeiture or power of re-entry reserved in any lease granted of the possessions or land revenues of the Crown is, after the 4th of August, 1845 (*l*), given by the Commissioners (*m*), such licence or waiver (unless otherwise

(so far as relates to any question as to the validity of any such surrender and re-grant) are confirmed by this Act. Accepting a surrender of an existing lease is not to be considered as taking a fine (see p. 163, *ante*).

(*d*) 8 & 9 Vict. c. 99.

(*e*) The Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), was passed to prevent frauds committed by tenants and for the more easy recovery of rents and renewal of leases. S. 6 of this Act relates to leases for lives and leases for years and to the leasing out of the property so leased in parcels to several under-tenants.

(*f*) Crown Lands Act, 1845 (8 & 9 Vict. c. 99), s. 7.

(*g*) Crown Lands Act, 1894 (57 & 58 Vict. c. 43), s. 6.

(*h*) The date of the passing of the Crown Lands Act, 1845 (8 & 9 Vict. c. 99); in pursuance of the powers contained in that Act or in the Crown Lands Acts, 1829 and 1832 (10 Geo. 4, c. 50, ss. 23, 28, 30, 61; 2 & 3 Will. 4, c. 1), and the Crown Lands (Scotland) Act, 1833 (3 & 4 Will. c. 69), all of which are recited in the preamble to the Crown Lands Act, 1845.

(*i*) As by the said recited Acts is provided. See preceding note.

(*k*) Crown Lands Act, 1845 (8 & 9 Vict. c. 99), s. 2.

(*l*) The date of the passing of the Crown Lands Act, 1845 (8 & 9 Vict. c. 99).

(*m*) Such Commissioners being authorised to do so by any memorandum in writing without stamp.

expressed) only extends to the actual breach of the particular covenant or condition in respect of which the same is given or to any specific breach of any proviso or covenant made or to be made, but not so as to prevent any proceeding for any subsequent breach or omission (unless otherwise specified in such licence) or to the actual assignment, underlease, or other matter specifically authorised to be done (*n*).

Commissioners may release Crown tenants from covenants etc.

329. The Commissioners, with the consent of the Treasury, may release, by licence or waiver in writing, a tenant or lessee or assignee of a lease of any lands or hereditaments, whether part of the land revenues of the Crown or not, which may be subject to the management of the Commissioners, from any covenant, condition, or agreement contained in a lease, agreement for a lease, or agreement for a yearly or other tenancy, either made or granted before the 30th of June, 1852 (*o*), or after that date, and whether any breach of such covenant or agreement has been committed or not, and either absolutely or conditionally on such tenant, lessee, or assignee doing such acts, or entering into such covenants or agreements or otherwise as the Commissioners think fit. Any covenant, condition, or agreement made or entered into by such tenant, lessee, or assignee in consideration of such release, so far as regards the rights, powers, and remedies of the Crown or of the Commissioners for enforcing performance or for re-entry for non-performance or non-observance of the same, is to be construed and taken as if the same were contained in the original lease or agreement for a lease, or other agreement, or otherwise as agreed on; and all other covenants or agreements and rights of re-entry in such leases or agreements not released will continue and remain in force as if there had been no such release or waiver or as may be agreed on (*p*).

The power conferred by this section to release from any covenant, condition, or agreement contained in a lease is extended by the Crown Lands Act, 1894 (*q*), to any covenant, condition, or agreement contained in a grant or other conveyance (*r*).

(*n*) Crown Lands Act, 1845 (8 & 9 Vict. c. 99), s. 5. All rights under covenants and powers of forfeiture and re-entry in the lease are to remain available as against any subsequent breach of covenant or condition, assignment, underlease, or other matter not specifically authorised or made dispunishable by such licence or waiver as if no such licence or waiver had been given; and the condition or right of re-entry is to remain as if such licence or waiver had not been given except in respect of the particular matter waived or authorised to be done or omitted.

The provisions of this section apply to s. 2 of the Crown Lands Act, 1852 (15 & 16 Vict. c. 62) (except so far as altered by that Act), as to licences and waivers granted under the authority of that Act.

(*o*) The date of the passing of the Crown Lands Act, 1852 (15 & 16 Vict. c. 62).

(*p*) *Ibid.*, s. 2. The provisions of s. 5 of the Crown Lands Act, 1845 (8 & 9 Vict. c. 99), apply (except so far as the same are altered by this section) to any licence or waiver granted under the authority of this Act.

(*q*) 57 & 58 Vict. c. 43.

(*r*) *Ibid.*, s. 7.

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330. Where in a lease made before the 4th of August, 1845 (*s*), or made after that date (*t*), there is a covenant on the part of the lessee to insure against fire the buildings erected under, or the hereditaments comprised in, such lease, the Commissioners may release by licence or waiver (*u*) the tenant or lessee from such covenant, whether default has been made in the same or not, or from any particular breach thereof (*a*).

And relieve from forfeiture for breach of covenants to insure.

And where such insurance is covenanted to be made in the names of the Commissioners or in the joint names of the Commissioners and any other person, or otherwise, the Commissioners may designate in writing any persons in whose names such insurance is to be made in lieu of the names of the Commissioners. The names of such persons are to be equivalent to the names of the Commissioners for the purposes of such insurance and covenant until such designation is revoked in writing and new persons appointed for such purposes by the Commissioners; or such insurance may be made in the name of such Commissioners as if they were a corporation, or jointly in such name and in the names of other persons (*b*).

Such Commissioners by their name alone or jointly with other persons (as the case may be) can sue and recover and receive under such policies of insurance (*c*).

Such insurances made in the names of persons so nominated either solely or jointly with other persons (as the case may be), or in the names of the Commissioners either jointly or solely and as they direct, is to be deemed a compliance with and performance of a covenant entered into to insure in the names of the Commissioners either solely or jointly with other persons or otherwise (*d*).

Exemption from stamp duty.

331. Deeds, receipts, or other instruments made or entered into by the Commissioners for the purpose of carrying into effect any lease, or contract or agreement for a lease, or counterpart of lease, are exempted from *ad valorem* or other stamp duty (*e*).

Leasehold interest may be purchased.

332. A leasehold interest in Crown lands may be purchased by the Commissioners (*f*).

Confirmation of invalid leases.

333. The Commissioners may confirm leases etc. where defective or liable to be set aside etc. (*g*).

(*s*) The date of the passing of the Crown Lands Act, 1845 (8 & 9 Vict. c. 99).

(*t*) In pursuance of the powers in the Crown Lands Act, 1829 (10 Geo. 4, c. 50), or the Crown Lands Act, 1845 (8 & 9 Vict. c. 99), contained.

(*u*) See p. 167, *ante*.

(*a*) Crown Lands Act, 1845 (8 & 9 Vict. c. 99), s. 8.

(*b*) *Ibid.*

(*c*) *Ibid.*

(*d*) *Ibid.*

(*e*) See p. 154, *ante*.

(*f*) See p. 159, *ante*.

(*g*) See p. 152, *ante*.

(4) *Exchanges.*

SECT. 2.

Surrendered Revenues arising from Crown Lands.

Commissioners may exchange lands.

334. The Commissioners of Woods may (*h*) exchange any part of the possessions and land revenues of the Crown (*i*) for other lands or hereditaments belonging to any persons, or bodies politic, corporate, or collegiate, and for the purpose of effecting such exchange the Commissioners may enter into such contracts or agreements as they deem proper; and may convey to such persons etc. with whom the exchange is made, or in such manner as they may direct or appoint, the part of the possessions and land revenues of the Crown so proposed to be given in exchange on the part of the Crown, and the fee simple and inheritance of the same (*k*); and the lands or hereditaments so received in exchange become, on the execution of the conveyances, part of the possessions and land revenues of the Crown (*l*).

They may also exchange part of such possessions and land revenues of the Crown which are held in perpetuity or otherwise for lands or hereditaments held by persons, or bodies politic, corporate, or collegiate, with whom the exchange is made, for a particular estate or interest, or for a term of years, or give a lease taken or purchased under the powers (*m*) in exchange for lands or hereditaments held in perpetuity or only for a particular estate or interest or for a term of years (*n*).

Money for equality of exchange.

335. They may also agree, on behalf of the Crown, for the receipt or payment of a sum of money for equalising any exchange to be made (*o*). The money so agreed to be received on the part of the Crown is to be paid into the Bank of England or Bank of Ireland or to the Commissioners of Woods, their receiver or agent, in the same manner as is directed (*p*) with regard to purchase-moneys on sales by the Commissioners (*q*).

Copyholds.

336. Where lands or hereditaments of copyhold or customary tenure are purchased or taken in exchange by the Commissioners

(*h*) Under the authority of the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and, *semble*, under any subsequent statutes affecting the same.

(*i*) Authorised to be sold.

(*k*) The conveyances by the Commissioners are to be attested, as to execution by the Commissioners, by at least one witness, and may be in the form as set out in the schedule annexed to the Act for conveyances on sale of parts of such possessions and land revenues, or in any other form which may be found more convenient. As to the effect of these conveyances, see note (*a*), p. 159, *ante*.

(*l*) *Ibid.*, s. 42. Within the ordering and survey of the Court of Exchequer, and subject to the same powers, provisions, and authorities, including the powers and provisions of the Act, as the other possessions and land revenues of the Crown to which the Act relates. As to the exemption from *ad valorem* or other duty of deeds, receipts, or other instruments for the purpose of carrying into effect any sale, purchase, or exchange by the Commissioners, see p. 168, *ante*.

(*m*) Of the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and, *semble*, any subsequent statutes affecting the same.

(*n*) *Ibid.*, s. 43.

(*o*) Under the authority of the Crown Lands Act, 1829 (10 Geo. 4, c. 50).

(*p*) As directed by the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and, *semble*, any subsequent statutes affecting the same. See p. 157, *ante*.

(*q*) *Ibid.*, s. 44.

SECT. 2. Surrendered Revenues arising from Crown Lands.

and surrendered or vested in trustees on behalf of the Crown, the trustees are to be indemnified by the Commissioners for all sums of money, fines etc. payable by them (*r*).

Inclosure Acts.

337. An exchange of lands in which the Crown is interested in reversion or remainder expectant upon the determination of an estate for life or other larger interest may be made by the Inclosure Commissioners (*s*) with the consent of the Crown (*a*).

(5) *Mortgages.*

Commissioners may mortgage.

338. For the purpose of discharging any mortgage debt or charge for the time being affecting the land revenues of the Crown, but for no other purpose (*b*), the Commissioners of Woods are empowered, with the consent and approbation in writing of any three or more Treasury Commissioners (*c*), to borrow and take up on mortgage any sum or sums of money, at any rate of interest not exceeding £5 per cent. per annum, on such terms and conditions as they think proper, subject to the like consent and approbation (*d*).

For securing the repayment of the money so borrowed or any part of the same the Commissioners (subject to the above consent) may grant, demise, or mortgage to any person, body, or body corporate, including their respective representatives, successors, assigns, or appointees, all or any part or parts of the houses, buildings, lands, tenements, or hereditaments belonging to the Crown within the county of Middlesex or City of London (other

(*r*) See p. 197, *post*.

(*s*) Now the Board of Agriculture and Fisheries. See the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), Sched. I.; and the Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31), s. 1.

(*a*) See p. 200, *post*.

(*b*) Under the statutes 2 & 3 Vict. c. 80, 3 & 4 Vict. c. 87, 4 & 5 Vict. c. 12, relating to the making of certain thoroughfares and improvements in the metropolis, as extended by the statute (1841) 4 & 5 Vict. c. 40, s. 1, the Commissioners of Woods, Forests, Works and Buildings were empowered to exercise the powers of borrowing on mortgage set out in the text (*infra*) for the purpose of completing the improvements authorised by the above Acts. Under the Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 3, by which the department of the Board of Works was separated from that of Woods (see p. 132, *ante*), the powers of mortgage conferred by the above Acts, and the statute 7 & 8 Vict. c. 1, were made exercisable by the Commissioners of Woods, so much of the former Acts as related to the purposes for which the money was to be borrowed and the application of the same being repealed and powers of borrowing for the purposes stated in the text substituted. The moneys received under the above Acts from sales, premiums on leases, and various other sums were directed to be applied in the first place in repayment of the sums borrowed on mortgage under the Acts and interest (Metropolis Improvements Expenses Act, 1841 (4 & 5 Vict. c. 40), s. 6). Nothing in the Metropolis Improvements Expenses Act, 1841 (4 & 5 Vict. c. 40) is to prevent the Commissioners from charging, raising, or borrowing the sums authorised, in the manner provided by the three Acts first mentioned in this note; and the Crown Lands Act, 1848 (11 & 12 Vict. c. 102), s. 7, is not to alter or affect the securities by way of mortgage on the land revenues, as regards the rights of mortgagees.

(*c*) As to the exercise of statutory or other powers by the Treasury Commissioners generally, see p. 124, *ante*.

(*d*) Metropolis Improvements Expenses Act, 1841 (4 & 5 Vict. c. 40), s. 1, as amended by the Crown Lands Act, 1851 (14 & 15 Vict. 42), s. 3; and see note (*b*), *supra*.

than royal palaces and parks) for any term of years (*e*). The grant, mortgage, or security must be made with a proviso or condition to cease and be void when the money secured and the interest on the same is fully paid and satisfied, and the grant, mortgage, or security is to be in the form or to the effect provided, or as near thereto as circumstances require or the Commissioners think proper (*f*).

Enrolment.

The mortgage and every assignment of the same must be enrolled in the Office of Land Revenue Records and Enrolments and entered in the Office of Woods within three calendar months from the date of the same (*g*).

Exemption from stamp duty.

The mortgage or security is not liable to any *ad valorem* or other stamp duty imposed by any Act of Parliament in force prior to the 21st of June, 1841, or by any subsequent Act, unless specifically made liable by such subsequent Act (*h*).

Effect of mortgage etc.

339. The effect of the grant, mortgage, or security is to entitle the person or body to or in trust for whom the same is made, and their respective representatives, successors, or assigns, to payment of the sum secured and interest according to its tenor; and the hereditaments included in the mortgage or charge are, as regards security to the mortgagee, to be freed and discharged from all charges and incumbrances affecting the land revenues of the Crown (*i*).

Costs.

340. The costs, charges, and expenses of the grant, mortgage, or security, or in any wise relating to the same, are to be defrayed by the Commissioners out of the moneys borrowed (*k*).

Receipts.

341. The receipts in writing of the Commissioners are a sufficient discharge for any money borrowed under the above powers to the persons or bodies by whom it is advanced, and the latter are not bound to see to the application of the same (*l*).

(6) *Enrolment.*

Enrolment of deeds etc.

342. All deeds or instruments by which Crown lands or hereditaments (*m*) are purchased, sold, leased, charged, or exchanged (*n*) must, without reference to the amount of the purchase-money or other consideration for the same, be enrolled in the Office of Land

(*e*) Metropolis Improvements Expenses Act, 1841 (4 & 5 Vict. c. 40), s. 1.

(*f*) *Ibid.*, where the form is given. For the purposes of the Metropolis Improvements Expenses Act, 1841 (4 & 5 Vict. c. 40), and the statute 7 & 8 Vict. c. 1, the Commissioners of Woods are to be a corporation with the right to use a common seal (*ibid.*, s. 4, as amended by the Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 3).

(*g*) Metropolis Improvements Expenses Act, 1841 (4 & 5 Vict. c. 40), s. 1.

(*h*) *Ibid.*, s. 7.

(*i*) *Ibid.*, s. 1.

(*k*) *Ibid.*

(*l*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 3.

(*m*) Estates, manors, lordships, messuages, lands, tenements, or hereditaments in England or Wales.

(*n*) Under the authority of the Act or any other Act then in force relating to the possessions and land revenues of the Crown. For times and regulations, see *infra*.

SECT. 2.

Surrendered Revenues arising from Crown Lands.

Revenue Records and Enrolments within the prescribed time and subject to the prescribed regulations (*o*).

Fees.

343. If the purchase-money or other consideration does not amount to £100, the Treasury may direct by whom the fees payable for the enrolment of such deeds or instruments are to be paid, and that the deposit in the Office of Land Revenue Records and Enrolments and the filing by the keeper of records and enrolments of a duplicate of the deed or instrument (either wholly written or partly written and partly printed) is a sufficient and complete enrolment (*p*).

The fees to be paid for enrolments (*q*) and for searches in the Office of Land Revenue Records and Enrolments, and for office copies furnished by the same office, are to be such as the Treasury from time to time appoints (*a*).

Deeds to be enrolled as brought in.

344. The keeper of the records and enrolments must enrol, or require to be enrolled, every deed and instrument (*b*) in order of time as the same is brought into his office for that purpose, and certify, or cause to be certified (*c*), upon the deeds or instruments when enrolled, the fact of their having been so enrolled (*d*).

(*o*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 6.

(*p*) *Ibid.* Deeds and instruments, by which lands or hereditaments were purchased, sold, leased, or exchanged after June 19th, 1829, the date of the passing of the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and under its authority, were directed by s. 63 of that Act to be enrolled within six months after the date of such deeds or instruments respectively in the office of the Commissioners for auditing the public accounts. This section (s. 63), although unrepealed, appears to be obsolete; and *quære*, whether the section is not directory only (see *Doe.* d. *William IV.* v. *Roberts* (1844), 13 M. & W. 520). The Statute Law Revision (No. 2) Act, 1890 (53 & 54 Vict. c. 51), s. 1, schedule, Part II., repealed a few immaterial words only in that section. The enrolment of assignments etc. of Crown leases was abolished by the Crown Lands Act, 1906 (6 Edw. 7, c. 28), s. 5. See p. 174, *post.* When deeds and instruments may be enrolled after the proper time, see p. 174, *post.*

(*q*) Made under the authority of the Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1).

(*a*) *Ibid.*, s. 22. The fees are not to exceed the amount of the fees usually taken upon the enrolment of the like title deeds or instruments, and upon the like searches, and upon furnishing the like office copies.

The fees on the enrolment of a lease, conveyance, deed, or other instrument, by which any part of the possessions and land revenues of the Crown is demised, granted, sold, or given in exchange, must be paid by the lessees, purchasers, or grantees, and in other cases by the Commissioners of Woods. A minute or docket of every such lease, grant, deed, or other instrument must be entered and preserved by such Commissioners in their office. If the purchase-money or other consideration does not amount to £100 the Treasury may direct by whom the fees payable for the enrolment of all deeds or instruments by which lands or hereditaments after August 1st, 1851, are purchased, sold, leased, charged or exchanged, are to be paid (see p. 171, *ante*). As to the power of the Treasury to regulate and make orders concerning the fees to be paid for enrolments, see note (*g*), p. 173, *post.* For the list of fees on enrolments, see p. 138, *ante;* as to fees on enrolment of instruments on enfranchisements in Crown manors, see note (*o*) at p. 195, *post.*

(*b*) Deeds etc. directed to be enrolled by the Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1).

(*c*) Under his hand or that of his deputy or assistant.

(*d*) *Ibid.*, s. 23.

SECT. 2.
Surrendered Revenues arising from Crown Lands.

Deposit of duplicate deeds.

345. Deeds and instruments relating to lands or hereditaments (*e*), to which the Commissioners are parties, or expressed to be parties, and which by the provisions of the Crown Lands Act, 1829 (*f*), or of any other Act or law, custom, or usage ought to be enrolled in the office of the auditor of the land revenues of the Crown, or in the Office of Land Revenue Records and Enrolments, may, if the Commissioners think fit so to direct, be deemed to be fully and sufficiently enrolled by the deposit of a duplicate of the same in the Office of Land Revenue Records and Enrolments and the filing or making of an entry of such deposit by the keeper of the records and enrolments (*g*).

Enrolment receivable in evidence;

346. Where a deed, certificate, receipt, or other instrument (*h*) relating to the possessions and land revenues of the Crown has a memorandum written on it signed by the keeper of the records and enrolments (or by his deputy or assistant) of its having been enrolled in such office, the memorandum, in the absence of evidence to the contrary, is sufficient proof of the deed etc. or other instrument having been made, granted, given, or executed by the parties thereto, and of its having been duly enrolled as stated in the memorandum and in accordance with the statutory provisions; and is receivable in evidence without proof of the handwriting of the signature thereto (*i*).

and also certified copies.

347. A signed or certified copy of or extract from a deed, instrument, document, or writing, map or plan, deposited in the Office of Land Revenue Records and Enrolments is admissible in evidence in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, or examine evidence, in every case in which the original, of or from which such copy or extract purports to have been made, would have been admissible in evidence (*k*).

(*e*) Manors, lordships, messuages, lands, tenements, or hereditaments in England or Wales.

(*f*) 10 Geo. 4, c. 50.

(*g*) Crown Lands Act, 1852 (15 & 16 Vict. c. 62), s. 7. A certificate by the keeper indorsed or written on the deed or instrument is evidence that the duplicate has been deposited and the entry made or filed as above stated, and that the Commissioners have directed that such deposit and entry should be sufficient enrolment, notwithstanding the provisions of the Crown Lands Act, 1851 (14 & 15 Vict. c. 42), or any other Act, law, custom, or usage (*ibid.*). It is not necessary to give evidence of the handwriting of the person signing such certificate, or of the fact that such person is the keeper of the records and enrolments (*ibid.*). The Treasury may from time to time regulate and make any order as they may think fit concerning the fees to be paid for or in respect of any enrolment, or direct that an enrolment may be made without payment of a fee (*ibid.*).

(*h*) Which appears to have been made, given, or executed under the authority of the Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1), or of any earlier Act.

(*i*) *Ibid.*, s. 26.

(*k*) Crown Lands Act, 1852 (15 & 16 Vict. c. 62), s. 8. The copy or extract must be signed and certified, or purport to be signed and certified, by the keeper of the records and enrolments as a true copy or extract. Evidence of the handwriting of the signature or certificate, or of the fact that the person whose name is affixed to it is such keeper, is not necessary (*ibid.*). If an officer wilfully certify a document as being a true copy or extract, knowing

SECT. 2. Surrendered Revenues arising from Crown Lands.

348. The Commissioners, for any reasonable cause shown for the omission or delay in the enrolment of deeds or other instruments, or minutes or dockets, or the entry of deeds or instruments in the office of the Commissioners, may permit the making of such enrolment or entry *nunc pro tunc* (*l*).

Enrolment after proper time.

Enrolment of assignments of leases abolished.

349. Assignments of leases of parts of the possessions and land revenues of the Crown under the management of the Commissioners, or instruments affecting the devolution of such leases, are not, after the 4th of August, 1906 (*m*), to be enrolled in the Office of Land Revenue Records and Enrolments (*n*).

Validity of deeds enrolled.

350. A deed, instrument, or writing to which the Commissioners of Woods, or Commissioners of Works, or either of them, is a party, or which is signed by any of the said Commissioners, or which affects or relates to the hereditary possessions and land revenues of the Crown (*o*), when enrolled in the Office of Land Revenue Records and Enrolments (*p*), is as good and available as if enrolled in the Royal Courts of Justice (*q*), or as if a memorial had been entered or registered in the office appointed for registering deeds in the county in which the same possessions and land revenues are situate (*r*).

Grant by letters patent.

351. Persons etc. claiming land or hereditaments under letters patent, or under the patentees, may make title by exemplification or *constat* of the enrolment of such letters patent (*s*).

Board of Trade.

352. The provisions of the Crown Lands Act, 1829 (*t*), are extended and apply, *mutatis mutandis*, to the Board of Trade, in respect of the foreshore under their control, by the Crown Lands

that the same is not so, he is guilty of a misdemeanour and liable on conviction to imprisonment for a term not exceeding eighteen months (*ibid.*).

(*l*) Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1), s. 27. Such enrolment is as valid and effectual as if made within the period limited for that purpose. Expired leases, tendered in evidence, are provable by examined copies although the originals may not have been enrolled in proper time (*Doe* d. *William IV.* v. *Roberts* (1844), 13 M. & W. 520).

(*m*) The date of the passing of the Crown Lands Act, 1906 (6 Edw. 7, c. 28).

(*n*) *Ibid.*, s. 5. Covenants in leases requiring such assignment or instrument to be so enrolled are annulled by this Act. The formality of enrolment was required by the Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 6. See p. 171, *ante*.

(*o*) Or any other lands, tenements, or hereditaments under the management or control of the same Commissioners, or any of them, in England or Wales.

(*p*) Without enrolment or acknowledgment of the same in any court of law or equity and without registration.

(*q*) Deeds which by any statute or statutory rule are directed or permitted to be enrolled in the courts whose jurisdiction has been transferred to the High Court of Justice may be enrolled in the Enrolment Department of the Central Office, R. S. C., 1883, Ord. 61, r. 9. The records of deeds so enrolled are sent to the Public Record Offices within two years from the time of enrolment (*ibid.*, r. 13).

(*r*) Crown Lands Act, 1853 (16 & 17 Vict. c. 56), s. 6. Notwithstanding any Act, law, practice, or usage to the contrary. This section recites the Crown Lands Acts, 1813 and 1832 (53 Geo. 3, c. 121, s. 59; 2 & 3 Will. 4, c. 1, s. 52).

(*s*) See p. 150, *ante*.

(*t*) 10 Geo. 4, c. 50.

Act, 1866 (*u*), with the exception that the consent of any authority or the enrolment of any instrument as is in any case required by certain sections (*x*) of the prior Act is not requisite under the latter Act (*a*).

SECT. 2. Surrendered Revenues arising from Crown Lands.

353. The settlement of disputed claims of the Crown to real or personal property or forestal rights must be enrolled (*b*). The reference and award on an arbitration with reference to a settlement of disputes respecting boundaries are to be enrolled (*c*).

Settlement of disputed claims of Crown.

354. Sales of copyholds for the purpose of enfranchisement, and of manorial rights belonging to the Crown, must be enrolled in the court rolls of the manor (*d*); instruments of enfranchisements in Crown manors must be enrolled by the keeper of the records and enrolments (*e*).

Copyholds.

355. Bonds of receivers giving security must be enrolled in the Office of Land Revenue Records and Enrolments (*f*).

Bonds of receivers.

356. An apportionment of rents or other payments payable to the Crown, when reduced into writing, signed by the parties agreeing, and confirmed by the Commissioners of Woods, must be enrolled in the Office of Land Revenue Records and Enrolments (*g*).

Apportionment of rents etc.

(7) *Arbitration.*

357. The Arbitration Act, 1889 (*h*), except as in the Act expressly mentioned, applies to arbitrations to which the Crown, in right of the Crown, or the Duchy of Lancaster or the Duke of Cornwall, is a party, but nothing in the Act empowers the court (*i*) or a judge to order proceedings to which the Crown or the Duke of Cornwall is a party or any question or issue in such proceedings to be tried before a referee, arbitrator, or officer without the consent of the Crown or the Duke of Cornwall, or affects the law as to costs payable by the Crown (*k*).

Application of Arbitration Act, 1889.

358. In case of disputes, doubts, or differences arising (*l*) between the Commissioners of Woods and other persons touching or concerning the extent of the boundaries (*m*) or the amount of the lands

Boundaries etc.

(*u*) Crown Lands Act, 1866 (29 & 30 Vict. c. 62).
(*x*) Ss. 74, 77, 81—85, 90—94.
(*a*) 29 & 30 Vict. c. 62, s. 10.
(*b*) See p. 155, *ante*.
(*c*) See p. 176, note (*o*), *post*.
(*d*) See p. 194, *post*.
(*e*) See p. 195, *post*.
(*f*) See p. 124, note (*b*), *ante*.
(*g*) See p. 206, note (*k*), *post*.
(*h*) 52 & 53 Vict. c. 49.
(*i*) "Court" means the High Court of Justice (*ibid.*, s. 27). See title ARBITRATION, Vol. I., p. 437.
(*k*) *Ibid.*, s. 23.
(*l*) Crown Lands Act, 1829 (10 Geo. 4, c. 50).
(*m*) A document purporting to be a survey of a manor made while part of the possessions of the Crown and coming out of the proper custody is admissible as evidence of the boundaries and customs of the manor (*Smith* v. *Brownlow* (*Earl*) (1870), L. R. 9 Eq. 241; *Dimes* v. *Arden* (1836), 6 Nev. & M. (K. B.) 494).

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Surrendered Revenues arising from Crown Lands.

or hereditaments (*n*) of the Crown, or rights of common, rights of way, or other rights or easements claimed or to be claimed in respect of or as appurtenant to, or in, over, upon, or out of the same lands or hereditaments, or otherwise in respect of or in relation thereto, the Commissioners may, with the consent and approbation of the Treasury, join and concur in referring the same to arbitration (*o*).

Power to summon witnesses.

359. Where a matter in difference, whether the subject of a pending suit in any court or not, or an issue in such suit, is referred to arbitration (*p*), the arbitrators or umpire may, on the application of either party, by summons require any person to attend before them to be examined as a witness, or to bring before them books, papers, maps, plans, and writings in his possession or control relating to the subject of the reference (*q*).

The arbitrators or umpire may administer an oath to a person examined, and may take the affidavit of any person (*a*).

Non-attendance.

If a person on whom such summons is served (*b*) fails to obey it without reasonable excuse, or refuses to be sworn or make affirmation, or to answer a lawful question put to him, he is liable on summary conviction to a penalty not exceeding £10 (*c*).

False evidence wilfully given on such examination on oath or in an affidavit renders the witness guilty of perjury (*d*).

(*n*) Lands, tenements, possessions, rents, or land revenues of the Crown to which the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and, *semble*, any subsequent statutes affecting the same relate.

(*o*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 94. Or to arbitration and umpirage upon such terms as the Commissioners think fit; and for that purpose they may make, sign, seal, and enter into such agreement or other contract for reference, for and on behalf of the Crown as they may deem advisable, and may perform the award to be made in pursuance of such reference. The submission to arbitration, or the agreement or other contract for the same, and the award, or a duplicate of the same, are to be enrolled, within three calendar months from the date of the award, in the office of the auditor or acting auditor of the land revenues of the Crown in England and Wales [now the Office of Land Revenue Records and Enrolments; see p. 137, *ante*], and, when so enrolled, are binding and conclusive on the Crown and other parties to the reference, their heirs, executors, administrators, and assigns. The enrolment is sufficient evidence of the submission, agreement, or other contract, and award, and of the making, signing, sealing, or executing of the same and of its contents, and is receivable as evidence in all courts of law and equity. As to the application of this and other sections of the Act to the Board of Trade, see p. 165, note (*a*), *ante*. As to the general provision for settlement of disputed claims of the Crown to real or personal property etc., see p. 155, *ante*.

(*p*) Under s. 94 of the Crown Lands Act, 1829 (10 Geo. 4, c. 50) (see note (*o*), *supra*), or under s. 5 of the Crown Lands Act, 1853 (16 & 17 Vict. c. 56), or under such sections or either of them as applied by the Crown Lands Act, 1866 (29 & 30 Vict. c. 62), ss. 7—10, 26—29.

(*q*) Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 26. The person so summoned must obey the summons on a reasonable sum being paid or tendered to him for his expenses.

(*a*) *Ibid.*, s. 27.

(*b*) Either personally, or by delivery at the person's last known or usual place of abode or business.

(*c*) Without prejudice to any other remedy against him (Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 28).

(*d*) *Ibid.*, s. 29.

(8) *Land Registration and Transfer.*

SECT. 2. Surrendered Revenues arising from Crown Lands.

Facilities for registration.

360. With respect to lands vested in the Crown, either in right of the Crown or of the Duchy of Lancaster or otherwise, or vested in a public officer or body in trust for the public services, the public officer or body having the management of the same (if any), or if none, then such person (*e*) as the Crown appoints in writing, may (whether the land is vested in him or them or not) represent the owner of such lands (*f*), and is entitled to such notices, and may make and enter such applications or caveats or cautions and do such other acts, as an owner of lands for an estate in fee simple is entitled to do (*g*).

Land below high-water mark.

361. If it appears to the registrar that any application for registration made to him comprises land below high-water mark at ordinary spring tides, he must not register the land until he is satisfied that at least one month's notice in writing of the application has been given to the Board of Trade; and in the case of land in the county palatine of Lancaster, also to the proper officer of the Duchy of Lancaster; and in the case of land in the counties of Cornwall or Devon, also to the proper officer of the Duke of Cornwall; and in all other cases also to the Commissioners of Woods (*h*). This, however, does not apply to registration with a possessory title (*i*).

(*e*) The word "person" in the Land Registry Act, 1862 (25 & 26 Vict. c. 53), includes the Crown and the Duke of Cornwall and also a body politic or corporate (*ibid.*, s. 140); and in the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), it includes a corporation and any body of persons unincorporate (*ibid.*, s. 4). As to lands belonging to the Duchy of Cornwall, such person as the Duke of Cornwall or the person for the time being entitled to the revenues and possessions of the Duchy of Cornwall appoints in writing may represent the owner of such lands for such purposes and under such provisions. It is sufficient that oaths, affidavits or declarations required by the Land Registry Act, 1862, be taken or made by such public officer, body, or person, or by any person nominated in writing by them, and in either case without a solicitor joining in any affidavit or declaration. It is not necessary for such public officer, body, or person to enter into a bond as mentioned in the Act, nor to give any security for costs; nor are they liable in damages except for acts done wrongfully and without reasonable cause. Conveyances or assurances of Crown lands enrolled in the Office of Land Revenue Records and Enrolments are exempt from registration in any local registry. As to enrolment of deeds or instruments, see p. 171, *ante*.

(*f*) For the purposes of the Land Registry Act, 1862 (25 & 26 Vict. c. 53), or the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), respectively. (In the Land Transfer Act, 1875, the words used are "estate, right, or interest in land" etc.)

(*g*) Land Registry Act, 1862 (25 & 26 Vict. c. 53), s. 114; Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 65.

(*h*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 66; Land Transfer Rules, 1908, r. 22. Where land comprised in an application for registration is below high-water mark at ordinary spring tides, the fact must be stated in the application, and the notices required by the above section must be prepared by the applicant and served through the registry within seven days after the delivery of the application (Land Transfer Rules, 1903, r. 33). As to the consent of the Admiralty and Board of Trade to working below high-water mark, see p. 145, *ante;* as to the registration and transfer of land generally, see titles REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

(*i*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 18, and Sched. I.

SECT. 2. Surrendered Revenues arising from Crown Lands.

Effect of registration.

362. The first registration of any person as proprietor of freehold land (*k*) or leasehold land (*l*) (in the Act referred to as first registered proprietor) with an absolute title vests in the person so registered an estate in fee simple in such land, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject to incumbrances and to certain provisions in the Act (*m*), but free from all other estates and interests whatsoever, including estates and interests of the Crown (*n*).

Escheated land.

363. The Land Transfer Act, 1897 (*o*), does not bind the Crown, and, therefore, the legal estate in escheated land does not vest in the Solicitor to the Treasury as the Crown's nominee to take out letters of administration (*p*).

(9) *Land Tax.*

Commissioners may redeem and purchase redeemed land tax.

364. The Commissioners of Woods (*q*) may redeem the land tax charged on any part of the possessions and land revenues of the Crown (*r*), and may purchase such land tax which may have been redeemed (*s*) by other persons (*t*).

Commissioners may contract for redemption.

365. The Commissioners of Woods (*u*), in respect of the land tax charged on manors (*a*) or other revenues of the Crown within the survey and receipt of the Exchequer, may, with the consent of the Treasury, contract for the redemption of the land tax (*b*).

(*k*) Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 7.

(*l*) *Ibid.*, s. 13; and Land Transfer Rules, 1903, rr. 55 to 59, 67.

(*m*) Ss. 7, 13. As to the rules made under the Land Transfer Acts, 1875 and 1897, see the Land Transfer Rules, 1903, and the Land Transfer Rules, 1908.

(*n*) *Ibid.*

(*o*) Land Transfer Act, 1897 (60 & 61 Vict. c. 65). The registrar, by virtue of the Land Transfer Act, 1897, and the principal Acts, is in a judicial position as regards his power to award indemnity, and an appeal from his award will lie to the High Court either by the Crown or by the "applicant" for indemnity (*A.-G.* v. *Odell*, [1906] 2 Ch. 47, C. A.).

(*p*) *Ibid.*, s. 1; *In the Goods of Hartley*, [1899] P. 40; *In the Goods of Ball*, [1902] W. N. 226. As to escheat generally, see titles CROWN PRACTICE; REAL PROPERTY AND CHATTELS REAL.

(*q*) As successors to the surveyor-general of the land revenues of the Crown (Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 58).

(*r*) To which the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and, *semble*, any subsequent statutes affecting the same relate; see p. 151, *ante*.

(*s*) Which may have been redeemed on or before, or may be redeemed after, 19th June, 1829 (the date of the passing of the Crown Lands Act, 1829).

(*t*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 57. This provision is not to be construed as authorising any person to purchase or redeem the land tax charged on lands or tenements belonging to the Crown contrary to the provisions of the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116). This latter Act has been repealed in part by various statutes, *inter alia* as to purchase of land tax by the Statute Law Revision Act, 1872 (35 & 36 Vict. c. 63), subject to certain exceptions and qualifications. The repeal by that Act of any enactment is not to affect any Act in which such enactment has been applied, incorporated, or referred to (*ibid.*, s. 1). The schedule to the Statute Law Revision Act, 1872, was repealed by the Statute Law Revision Act, 1894 (57 & 58 Vict. c. 56). As to land tax generally, see title LAND TAX.

(*u*) Formerly the surveyor-general of the land revenues of the Crown.

(*a*) Manors, messuages, lands, tenements, rents, or other revenues of the Crown.

(*b*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 131.

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Sales for purpose of raising money.

366. No sale may be made under the authority of the Land Tax Redemption Act, 1802 (*c*), of manors, messuages, lands, tenements, rents, tithes, mines, minerals, collieries, woods, woodgrounds, fens, marshes, waste lands or other hereditaments belonging to the Crown within the survey of the Exchequer for the purpose of raising money for the redemption of the land tax charged upon manors, messuages, lands, tenements, tithes, rents, or other premises of the Crown ; but all sales made of the possessions or land revenues of the Crown (*d*), for raising money for the redemption of land tax, or for any other purpose to which moneys to arise from such sales are by the latter Act directed to be applied, must be made under the powers and provisions of the latter Act (*e*).

Redemption by Crown tenants.

367. Where a tenant or lessee of Crown lands (*f*) transfers a sum of stock into the names of the Commissioners for the Reduction of the National Debt for the purpose of purchasing or redeeming the land tax, and the attempted purchase or redemption is invalid or doubtful (*g*), the Commissioners of Woods, with the consent in writing of the Treasury, may, out of the annual income of the land revenues of the Crown, purchase and transfer to such lessee or tenant, his executors, administrators or assigns, so much stock as they may consider to be a due compensation for the stock transferred by the tenant or lessee. Upon the execution of an instrument in writing acknowledging such transfer by the person to whom such stock is so transferred (*h*) the land becomes freed and discharged from the payment of the land tax and arrears (*i*), but remains subject to rent-charge (*j*).

Restriction on redemption.

368. The powers of contracting and agreeing for the redemption of land tax conferred (*k*) upon persons having any interests in land (except such interests as are expressly included) do not extend to tenants holding under the Crown any lands or tenements formerly within the survey or receipt of the Exchequer for any term of years, or from year to year, or at will (*l*).

Redemption by grantee from Crown or under statute.

369. Any person holding, under a grant from the Crown or under an Act of Parliament, lands or hereditaments (*m*) in which

(*c*) 42 Geo. 3, c. 116.
(*d*) To which the Crown Lands Act, 1829 (10 Geo. 4, c. 50), relates.
(*e*) *Ibid.*, s. 59.
(*f*) To which the Crown Lands Acts, 1829 (10 Geo. 4, c. 50) and 1845 (8 & 9 Vict. c. 99), and, *semble*, any subsequent statutes affecting the same relate.
(*g*) Under the provisions of the Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60).
(*h*) To be enrolled in the Office of Land Revenue Records and Enrolments.
(*i*) Crown Lands Act, 1845 (8 & 9 Vict. c. 99), s. 9.
(*j*) During the continuance of the estate of such tenant or lessee, his executors, administrators or assigns, by whom such attempted purchase or redemption of land tax is made, the Crown is entitled to a rent-charge out of such lands on which the land tax is so redeemed, equal in amount to the land tax redeemed—the rent to be payable yearly, and recoverable by distress as in the case of rent reserved on lease (*ibid.*).
(*k*) By the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116).
(*l*) *Ibid.*, s. 10.
(*m*) Manors, messuages, lands, tenements, or hereditaments.

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the Crown has an estate, right, or interest, in remainder, reversion or expectancy (other than persons holding certain interests in certain lands in the Duchies of Lancaster and Cornwall) (*n*), may (if such person is in the actual possession or entitled beneficially to the rents and profits of the same), for the purpose of raising money to complete the redemption of the land tax (*o*), sell such lands or hereditaments (*p*); and may enfranchise such lands or hereditaments which are held by copy of court roll or other customary tenure; and may also sell heriots, fee farm rents, chief rents, or quit rents, or other emoluments or advantages payable in respect of such lands or hereditaments (*q*).

Effect of redemption.

370. On the redemption of land tax charged on lands or other revenues of the Crown and upon registration (*a*), such lands are freed and exonerated from such land tax; and the amount of the land tax during the continuance of a lease or demise (*b*) is considered as rent due to the Crown, and recoverable as such by the Crown from the lessees and by such lessees from their underlessees or tenants (*c*).

(10) *Tithe.*

Tithe Act, 1832.

371. All prescriptions and claims of or for a *modus decimandi*, and of or to any exemption from or discharge of tithes, by composition real or otherwise, are, in cases where the render of tithes in kind is, after the 9th August, 1832 (*d*), demanded by the Sovereign, or by any Duke of Cornwall, subject to the provisions of the Tithe Act, 1832 (*e*).

Commutation of ecclesiastical tithes—consent.

372. Where tithes belong to an ecclesiastical person in right of any spiritual dignity or benefice, no agreement for the commutation of such tithes (*f*) is deemed to be executed by the owner of such tithes unless consent is given as follows: in the case of an archbishop or bishop, the consent of the Crown (*g*); in case of the incumbent of any other benefice or ecclesiastical dignity, the

(*n*) Namely, lands or hereditaments held under the Crown within the survey and receipt of the Exchequer or the Duchy of Lancaster, or held under the Duke of Cornwall by demise or grant by copy of court roll or otherwise, for life or lives, or for years determinable on a life or lives, or for a term of years absolute, or from year to year, or during pleasure.

(*o*) But under the restrictions and regulations of the Act.

(*p*) Whether they are charged or not charged with land tax, and if so charged, freed from such land tax.

(*q*) Land Redemption Act, 1802 (42 Geo. 3, c. 116), s. 71. The lands or hereditaments the land tax on which is redeemed are to be limited to the same uses, trusts, and purposes as those sold or enfranchised.

(*a*) In the manner directed by the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116).

(*b*) In being on 26th June, 1802, the date of the passing of the above Act.

(*c*) *Ibid.*, s. 141. The amount is to be collected and received by such persons, and subject to such orders and regulations, as the Treasury, in respect of the Crown lands within the survey and receipt of the Exchequer, appoint and establish.

(*d*) This applies to demands after 9th August, 1832, the date of the passing of the Tithe Act, 1832 (2 & 3 Will. 4, c. 100).

(*e*) *Ibid.*, s. 1. As to tithes generally, see title ECCLESIASTICAL LAW.

(*f*) Made and executed under the Tithe Act, 1836 (6 & 7 Will. 4, c. 71).

(*g*) Signified by the Lord High Treasurer or First Lord Commissioner of the Treasury.

consent of the patron or person entitled to present to such benefice or dignity in case the same were then vacant (*h*).

373. When the ownership of lands or tithes, to which the provisions of the Tithe Act, 1836 (*i*), apply, is vested in the Crown, the First Commissioner of Woods (*k*) is for the purposes of that Act substituted for the owner of such lands or tithes.

374. When the patronage of a benefice (*l*) is vested in the Crown, the Lord High Treasurer or First Lord Commissioner of the Treasury, where the value of such benefice is above the yearly value of £20 in the King's books, and, where such value is of or below such yearly value, the Lord Chancellor or Lord Keeper or First Lord Commissioner of the Great Seal, is substituted instead of the patron for the purpose of such consent (*m*).

(11) *Royal Forests.*

Definition of "forest."

375. A "forest" was defined in 1598 (*n*) as "a certaine territorie of woody grounds and fruitful pastures, priviledged for wilde beasts and foules of forest, chase and warren (*o*), to rest and abide in, in the safe protection of the King, for his princely delight and pleasure, which territorie of ground, so priviledged, is meered and bounded with unremovable markes, meeres, and boundaries, either known by matter of record, or else by prescription, and also replenished with wilde beasts of venerie or chase, and with great coverts of vert (*p*), for the succour of the said wild beasts, to have their abode in: for the preservation and continuance of which said place, together with the vert and venison (*q*), there are certaine particular

(*h*) Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 26. The consent to be given in writing and annexed to the agreement. This section was repealed by the Statute Law Revision Act, 1890 (53 & 54 Vict. c. 33), s. 1, Schedule, but with a proviso that the repeal did not extend to tithes which had not been commuted. Among the numerous clauses in the "savings" to that Act it is stated as follows: "nor shall such repeal of any enactment affect any right to any hereditary revenues of the Crown, or affect any charges thereupon or prevent any such enactment from being put in force for the collection of any such revenues or otherwise in relation thereto."

(*i*) 6 & 7 Will. 4, c. 71. As to the general provisions relating to tithes, see title ECCLESIASTICAL LAW.

(*k*) Or in case such lands or tithes are vested in the Crown in right of the Duchy of Lancaster or of the Duchy of Cornwall, the Chancellor of the Duchy of Lancaster, or the officers of the Duchy of Cornwall entitled to grant leases of lands part of the Duchy of Cornwall.

(*l*) To which the provisions of the Tithe Act, 1836 (6 & 7 Will. 4, c. 71), apply.

(*m*) *Ibid.*, s. 13; amended as to the transfer of powers from the Commissioners of Woods, Forests, Works and Buildings to the Commissioners of Woods by the Crown Lands Act, 1851 (14 & 15 Vict. c. 42), s. 2. If such patronage is vested in the Crown in right of the Duchy of Lancaster, the Chancellor of such Duchy is for the purposes of this Act substituted for the patron. For dispositions of the foreshore, see pp. 142 *et seq.*, *ante*.

(*n*) Manwood, Forest Laws, 1598 ed., p. 18. On the subject generally, see G. J. Turner, Select Pleas of the Forest (Selden Society); Holdsworth, History of English Law, Vol. I., pp. 340—352.

(*o*) As to the distinction between a forest or chase, a park and warren, see Vol. VI., p. 490.

(*p*) The word "vert" in general includes every tree, underwood, bush and the like growing in a forest, and having green leaves which may cover or feed the deer.

(*q*) "Venison" comprehends every beast of forest and chase, and is a general

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lawes, priviledges, and officers belonging to the same, meete for that purpose, that are only proper unto a forest, and not to any other place" (*r*). The royal forests, therefore, possessed peculiar officers, peculiar courts, and a peculiar law. Even in 1598 their organisation and law were in a state of decay (*a*). But, as some peculiarities still survive in the law relating to these royal forests, it is necessary to say something of the older order.

Forest justices, wardens, verderers, foresters, and agisters.

376. The chief classes of officers of the forests were as follows:—From 1238 the forests were divided into two departments according as they lay to the north or south of the Trent, and over each a justice was appointed (*b*). These justices did their work by deputies appointed sometimes by the Crown, sometimes by the justice (*c*). Over particular forests or groups of forests were officials called wardens. They were the executive officers of the Crown to whom writs were addressed, and who held the forest courts (*d*). For each forest there were a varying number of officers (usually four) elected in the county court called verderers. They were responsible to the Crown, and their duty was to attend the forest courts (*e*). Under the wardens there were a varying number of officials called foresters, who did the work of a modern gamekeeper (*f*). In each forest there were four agisters, whose duty was to collect the money due for agistment and pannage (*g*).

Forest courts.

377. The powers and jurisdiction of these officials were exercised in the following courts: (1) The Court of Swanimote. The term "swanimote" has been applied to different courts at different

term for them all. As to what are beasts of the forest and chase and fowls and beasts of warren, see Select Pleas of the Forest (Selden Society), pp. x.—xiv.; and Vol. VI., pp. 490, 491.

(*r*) The Charters of the Forests set out in the Appendix to Manwood, Forest Laws, 5th ed., at p. 393, are:—Carta de Foresta of Canute; Carta de Foresta, 9 Hen. 3; Assiza et Consuetudines Forestæ, 6 Edw. 1; Ordinatio Forestæ, made 34 Edw. 1; statutes 1 Edw. 3, c. 8; 7 Ric. 2, c. 3; 22 Edw. 4, c. 7; 32 Hen. 8, c. 13 (statute for the drift of forests, and what beasts are not commonable in the waste of the forests); 17 Car. 1, c. 16 (an Act about the boundaries etc. of forests). An abstract of Acts of Parliament relating to the protection of deer in forests is set out in Lewis on Forests and Forest Laws, p. 139, Appendix I., and is as follows:—Translation of the Charter and Constitutions of Canute, granted at a Parliament holden at Winchester, A.D. 1016; Carta de Foresta, 9 Hen. 3, c. 2; Assiza et Consuetudines Forestæ, 6 Edw. 1; Ordinatio Forestæ, made 34 Edw. 1; Charter of Confirmation, 3 Edw. 3, c. 1; 16 & 17 Car. 1, c. 16, respecting the boundaries of forests. For a list of ancient cases relating to the various forests generally, see Manwood, Forest Laws, 5th ed., Table C; and for those relating to the felling of timber for the repair of bridges in the forests, see *ibid.*, p. 47; and for the rolls of the forests, *ibid.*, pp. 331 to 334; and as to rights of common in forests, *ibid.*, pp. 82—99. "Forestage" was the duty or tribute payable to the foresters of the Sovereign (Cowell's Interpreter).

(*a*) Manwood, Forest Laws, 1665 ed., Preface, and p. 71.

(*b*) Select Pleas of the Forest (Selden Society), pp. xiv., xv.

(*c*) *Ibid.*, xv., xvi.; the statute 32 Hen. 8, c. 35, gave validity to the practice.

(*d*) Select Pleas of the Forest (Selden Society), pp. xvi.—xix.

(*e*) *Ibid.*, pp. xix., xx.; Manwood, Forest Laws, 1665 ed., pp. 403—407; 4 Co. Inst. 292, 293.

(*f*) Manwood, Forest Laws, 1665 ed., pp. 428—439; 4 Co. Inst. 293; Select Pleas of the Forest (Selden Society), pp. xx.—xxiv.

(*g*) Select Pleas of the Forest (Selden Society), p. xxv.

periods in the history of the forest law. It meant originally a court held three times a year for business connected with agistment, pannage, and fawning (*h*); but the term is sometimes applied to the inquisitions held to inquire into trespasses to vert and venison (*i*). (2) The Court of Attachment. This court was held every forty days by the verderers to view the attachments made by the foresters for offences against vert and venison (*k*). In all but the smallest cases the actual trial took place before the justices in eyre (*l*). (3) Special and General Inquisitions (*m*). These were held by the foresters and verderers with the assistance of the four neighbouring townships. The special inquisitions seem to have given place to general inquisitions in Edward I.'s reign. They are called swanimotes in a statute of 1306 (*n*), and the mode of taking them is defined. All offences against the forest law and the misdoings of officials could be presented. (4) The Regard (*o*). This was an inquiry held once every three years by twelve knights chosen for the purpose. The most important subject of inquiry were essarts, purprestures (*p*), and waste. It saw also to the expeditation of dogs (*q*). (5) The Eyre (*r*). This was the court held by the justices in eyre of the forest, sometimes called the Court of Justice Seat (*s*). These justices were appointed by the Crown to hear the pleas of the forest in a certain county or collection of counties. All the landholders and officers of the forests were summoned before them; and all persons presented at the special and general inquisitions and the regard were amerced. It was the revenue from this source which was the most valuable part of the revenue of the forests (*t*). It was probably held about once in seven years (*a*). The law of the forests was distinct from the common law (*b*).

Forest courts.

(*h*) Select Pleas of the Forest (Selden Society), pp. xxvii. *et seq.*; it is so defined in s. 8 of the Forest Charter of 1217.

(*i*) The term was so applied by the Ordinatio Forestæ, 34 Edw. 1, stat. 5, c. 1; Manwood, Forest Laws, 5th ed., chap. 23.

(*k*) Forest Charter (1217), s. 8; Select Pleas of the Forest (Selden Society), pp. xxx. *et seq.* The term "swanimote" is sometimes applied to this court (*ibid.*, p. xxxvi.).

(*l*) Select Pleas of the Forest (Selden Society), p. xxxvi.

(*m*) *Ibid.*, pp. xxxvii.—l.

(*n*) 34 Edw. 1, stat. 5, c. 1.

(*o*) Select Pleas of the Forest (Selden Society), pp. lxxxv.—lxxvii.; 4 Co. Inst. 292; Manwood, Forest Laws, 5th ed., pp. 408, 409.

(*p*) A purpresture (derived from the French *pourpris*, an inclosure) is where there is a house erected, or an inclosure made, upon any part of the King's demesnes, or of a highway, or common street, or public water, or such like public things (4 Bl. Com., 14th ed., 167; Co. Litt. 277; Manwood, Forest Laws, 5th ed., pp. 304 *et seq.*; Select Pleas of the Forest (Selden Society), pp. lxxxi.—lxxxiii.).

(*q*) Select Pleas of the Forest (Selden Society), p. lxxvi., and compare p. cxiii.

(*r*) *Ibid.*, pp. l.—lxix.

(*s*) 4 Co. Inst. 292, 293.

(*t*) Dialogus de Scaccario, II., p. xi.; Select Pleas of the Forest (Selden Society), p. lx. For the articles of the eyre, see Fleta, II., 41, 12—51; Manwood, Forest Laws, 5th ed., pp. 509—525.

(*a*) Select Pleas of the Forest (Selden Society), pp. lvi., lvii.; 4 Co. Inst. 291. Manwood, Forest Laws, 5th ed., p. 411, states that, like the regard, it was sometimes held once in three years.

(*b*) Dialogus de Scaccario I., p. xi.; compare *Anon.*, Keil., 150 b, pl. 43; Manwood, Forest Laws, 5th ed., pp. 486, 490, 491; 4 Co. Inst. 315, 317.

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378. The King was not the owner of all the land in the forests. The owners of such land could use it as they pleased, provided that they did nothing which interfered with the beasts of the forest (*c*). The owners of these lands appointed officers called woodwards, whose duty it was to protect both the property of their masters and the King's venison (*d*).

Royal forests.

379. A royal forest was a franchise of the most valuable kind (*e*). Occasionally this franchise was granted to a subject (*f*); but generally the effect of the grant of a forest was to vest in the grantee a "chase" (*g*).

Boundaries.

380. The forest organisation was never popular. In spite of statutes (*h*) the officers of the forests, especially the foresters, used their powers to oppress the inhabitants of the forest (*i*), and the forest jurisdiction curtailed the rights of the landowners therein. The boundaries of the forest were limited by Magna Carta (1215) (*k*) and by the Charter of the Forest (1217) (*l*). In 1218 (*m*), 1219 (*m*), 1225 (*n*), 1277 (*o*), 1298 (*o*), and 1300 (*o*) perambulations were made with a view to disafforestment; and a statute of 1327 (*p*) fixed the boundaries of the forest as so established. Charles I., in the years 1632—1637, attempted to reafforest extensive tracts of land (*q*). In consequence an Act of the Long Parliament finally fixed the boundaries of the forests (*r*).

Purlieus.

Certain land, which had once formed part of a forest but had been disafforested in consequence of a perambulation, was known as a "purlieu" (*s*). Though these purlieus were not within the forest they were patrolled by officers called rangers, whose chief duty

(*c*) Select Pleas of the Forest (Selden Society), p. xxv.; compare *Blanchard* v. *Cawthorne* (1833), 6 Sim. 155, where it was held that certain owners of land in the forest of Wyersdale, in the county of Lancashire, could be restrained by injunction from sporting in it.

(*d*) Select Pleas of the Forest (Selden Society), pp. xxiv., xxv.

(*e*) For franchises generally, see Vol. VI., p. 489.

(*f*) In 1266–1287 Henry III. granted these privileges to the Earl of Derby, and in 1285 Edward I. made a similar grant to his brother Edmund (Select Pleas of the Forest (Selden Society), pp. cxi., cxii.).

(*g*) That the grant of a forest could be made to a private person is asserted in *Leicester Forest Case* (1607), Cro. Jac. 155; and *Jennings* v. *Rocke* (1595), Palm. 93, 94. Though Coke denied that this was legally possible in *R.* v. *Briggs* (1615), 2 Bulst. 295, he seems to retract this view in 4 Co. Inst. 314; compare *Sutton* v. *Moody* (1697), 1 Ld. Raym. 250; *Robinson* v. *Duleep Singh* (1879), 11 Ch. D. 798, C. A.

(*h*) 34 Edw. 1, stat. 5; 1 Edw. 3, stat. 1, c. 8; 25 Edw. 3, stat. 5, c. 7; 7 Ric. 2, c. 3; Manwood, Forest Laws, 5th ed., pp. 432—439.

(*i*) Select Pleas of the Forest (Selden Society), pp. 44—53, 125—128.

(*k*) Ss. 47, 48.

(*l*) Ss. 1, 3.

(*m*) Select Pleas of the Forest (Selden Society), pp. xciv.—xcvi.

(*n*) *Ibid.*, pp. xcvii., xcviii.

(*o*) *Ibid.*, pp. ci.—cvi. Some account of these perambulations is given in *R.* v. *Rodley (Inhabitants)* (1667), Hard. 437, 438.

(*p*) 1 Edw. 3, stat. 2, c. 1.

(*q*) See Sir W. Jones' Reports at pp. 266—298 for the eyre in Berkshire in 1632; and compare Gardiner, History of England, vii., p. 363; viii., pp. 77, 86, 282.

(*r*) 16 Car. 1, c. 16.

(*s*) 4 Co. Inst. 303, 304.

consisted in seeing that the beasts of the forest did not stray into these districts (*t*).

Present control of forests.

381. Even before the seventeenth century the forest organisation was in a state of decay. In the course of that century the process of decay was accelerated. The courts of common law supervised the proceedings of the forest courts (*u*), and limited their jurisdiction (*x*). Eyres were seldom held (*y*); and the cessation of the eyre meant the collapse of the whole system, as upon it the proceedings of all the lower courts depended (*a*).

Such parts of the old organisation as remain are now regulated by statutes of the nineteenth century. In 1817 the offices of Warden, Chief Justice and Justice in Eyre of the forests were abolished (*b*); and in 1829 the powers of these officials were vested in the First Commissioner of His Majesty's Woods, Forests, and Land Revenues (*c*). Large powers over existing forestal officers and over disputes as to forest boundaries were given to the Commission (*d*), and the jurisdiction of the Court of Attachment was regulated (*e*). But it was provided that the Crown could always have recourse to the ordinary law and the ordinary courts, if it saw fit (*f*). In 1832 the powers of this Commission were handed over to the Commission of Woods, Forests, Land Revenues, Works and Buildings (*g*). When, in 1851, the Commissioners of Woods, Forests, and Land Revenues were separated from the Commissioners of Works and Public Buildings (*h*) the greater part of the control of the forests was handed over to the former Commissioners (*i*). Their control is subject to numerous local Acts passed to deal with particular forests (*k*).

(*t*) Manwood, Forest Laws, 5th ed., pp. 396—398; Coke tells us, 4 Co. Inst. 304, that "these rangers have used to prevent unlawful hunting and hunters of the King's deer within the purlieu, as in the night or at unseasonable deer, or killing of the king's deer by no purlieu men, but unlawful hunters or the like, such as should not take advantage of their own wrong both to the King and the purlieu men."

(*u*) 4 Co. Inst. 290, 294, 297.

(*x*) *Lovelace's* (*Lord*) *Case* (1689), Comb. 159.

(*y*) Manwood, Forest Laws, 5th ed., pp. 161, 162.

(*a*) *Ibid.*, at p. 505, he says, "By the laws of the Forest all the proceedings of those courts for the greatest offences done in the Forest are as nothing until such time as they are presented to the Lord Justice in Eire of the Forest at the Justice Seat"; for an eyre held at the end of the seventeenth century, see North, Life of Lord Keeper Guilford (Jessopp's ed.), i., pp. 57, 58; 3 Bl. Com. 73.

(*b*) 57 Geo. 3, c. 61.

(*c*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 95.

(*d*) *Ibid.*, ss. 14, 94, 96.

(*e*) *Ibid.*, ss. 100—102.

(*f*) *Ibid.*, ss. 103, 104.

(*g*) Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1).

(*h*) Crown Lands Act, 1851 (14 & 15 Vict. c. 42).

(*i*) By the Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 6. The duties and powers of management and all other duties and powers exercised by the Commissioners of Woods relative to the forestal rights and interests of the Crown in, to, or over that portion of Waltham Forest usually called Epping Forest, after the 31st December, 1866, were transferred to the Commissioners of Works; for other statutes relating to Epping and Waltham Forests, see note (*k*), *infra*.

(*k*) The local statutes relating to the royal forests now in force are as follows:—

Alice Holt—(1812) 52 Geo. 3, c. 72; (1855) 18 & 19 Vict. c. 16.

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Surrendered Revenues arising from Crown Lands.

382. The Commissioners of Woods have power to grant leases for a term not exceeding thirty-one years of any part of the royal forests for the purpose of making a railway, tramroad, or inclined plane, or for erecting a steam engine or other works or machinery, with a licence in such lease to make or erect the same, and to raise, get, and carry away stone, slate, coal, ore, or marl in the royal forests (*l*).

Leases of forests for mineral railways etc.

But no such lease or licence may be granted where its use would interfere with or abridge or prove inconsistent with the exercise of rights vested in certain companies established by statute (*m*) without their previous consent and concurrence (*n*).

Form of leases.

All leases granted under the authority of the Crown Lands Act, 1829, of parts of the royal forests may be either in the form set out in the schedule to that Act or in any other form which the Commissioners may deem more expedient (*o*).

Brecknock—(1812), 52 Geo. 3, c. 161; (1815), 55 Geo. 3, c. 190; (1818), 58 Geo. 3, c. 99.

Dean—(1667-8), 19 & 20 Car. 2, c. 8; (1808), 48 Geo. 3, c. 72; (1819), 59 Geo. 3, c. 86; (1836), 6 & 7 Will. 4, c. 3; (1837-8), 1 & 2 Vict. c. 42; (1837-8), 1 & 2 Vict. c. 43; (1842), 5 & 6 Vict. c. 48; (1842), 5 & 6 Vict. c. 65; (1845), 8 & 9 Vict. c. 118, s. 13; (1852), 15 & 16 Vict. c. 62, s. 1; (1855), 18 & 19 Vict. c. 16; (1861), 24 & 25 Vict. c. 40; (1866), 29 & 30 Vict. c. 62, s. 5; (1866), 29 & 30 Vict. c. 70; (1871), 34 & 35 Vict. c. 85; (1883), 46 & 47 Vict. c. lxxxvii.; (1904), 4 Edw. 7, c. clvi.; (1906), 6 Edw. 7, c. cxix.

Delamere—(1855), 18 & 19 Vict. c. 16; (1856), 19 & 20 Vict. c. 13.

Epping—(1866), 29 & 30 Vict. c. 62, s. 6; (1871), 34 & 35 Vict. c. 93; (1872), 35 & 36 Vict. c. 95; (1875), 38 & 39 Vict. c. 6; (1878), 41 & 42 Vict. c. ccxiii.; (1880), 43 & 44 Vict. c. cxxx.

Exmoor—(1814-5), 55 Geo. 3, c. 138.

Hainault—(1851), 14 & 15 Vict. c. 43; (1858), 21 & 22 Vict. c. 37.

Isle of Man—(1865), 28 & 29 Vict. c. 28.

New—(1799-1800), 39 & 40 Geo. 3, c. 86; (1801), 41 Geo. 3 (U. K.), c. 108; (1806), 48 Geo. 3, c. 72; (1810), 50 Geo. 3, c. 116; (1812), 52 Geo. 3, c. 161; (1819), 59 Geo. 3, c. 86; (1845), 8 & 9 Vict. c. 118, s. 13; (1849), 12 & 13 Vict. c. 81; (1851), 14 & 15 Vict. c. 76; (1852), 15 & 16 Vict. c. 62, s. 9; (1854), 17 & 18 Vict. c. 49; (1866), 29 & 30 Vict. c. 62, s. 5; (1866), 29 & 30 Vict. c. 66; (1877), 40 & 41 Vict. c. cxxi.; (1879), 42 & 43 Vict. c. cxciv.; (1883), 46 & 47 Vict. c. lxxxvi.

Salcey—(1825), 6 Geo. 4, c. 132; (1855), 18 & 19 Vict. c. 16.

Sherwood—(1818), 58 Geo. 3, c. 100.

Silston—(1824), 5 Geo. 4, c. 99.

Waltham—(see also Epping, *supra*) (1849), 12 & 13 Vict. c. 81.

Whichwood—(1852-3), 16 & 17 Vict. c. 36; (1856), 19 & 20 Vict. c. 32.

Whittlewood—(1824), 5 Geo. 4, c. 99; (1853), 16 & 17 Vict. c. 42; (1854-5), 18 & 19 Vict. c. 16.

Windsor—(1813), 53 Geo. 3, c. 158; (1815), 55 Geo. 3, c. 122; (1816), 56 Geo. 3, c. 132.

Woolmer—(1812), 52 Geo. 3, c. 71; (1855), 18 & 19 Vict. c. 16; (1855), 18 & 19 Vict. c. 46.

(*l*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 97. These leases are to be made under such modifications and restrictions, for such yearly rent, and upon such terms and conditions as the Commissioners of Woods may deem expedient. As to the powers of leasing contained in the Crown Lands Act, 1702 (1 Ann. c. 1; stat. 1, c. 7, Ruff.), see p. 147, *ante;* as to the provisions generally relating to mines and quarries under forests, see title MINES, MINERALS, AND QUARRIES.

(*m*) 49 Geo. 3, c. clviii.; 49 Geo. 3, c. clix. These statutes refer to the making and maintaining of railways and tramroads in the Forest of Dean and places adjoining thereto.

(*n*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 97.

(*o*) *Ibid.*, s. 99.

The Crown has no right to interfere with the vesting of a Crown lease in a trustee in bankruptcy (*p*).

Compensation for relinquishing encroachments.

383. In all cases of purprestures or encroachments in the royal forests which appear to have been inclosed or used and occupied by the persons then in possession, or under whom the same are claimed to be held without any effectual interruption on the part of the Crown for a period not less than ten years, the Commissioners may make satisfaction or compensation in money in consideration of the removal, abatement, or resumption of such encroachment or purprestur, or may grant to the persons in possession thereof a lease for a term not exceeding three lives or thirty-one years either of such encroachment or purprestur, or any other part of the forest in lieu thereof, as may appear to them reasonable and proper (*q*).

Commissioners may sell etc. certain lands in forests.

384. The Commissioners may contract for the sale or exchange of and dispose of, either by way of sale for a money consideration or by way of exchange for other lands or hereditaments, with or without giving or receiving a sum of money for equality of exchange, any part of the possessions and land revenues of the Crown (*r*) consisting of land not suitable for the growth of timber in the royal forests wholly or in part surrounded by, intermixed with, or contiguous to other lands not the property of the Crown, and waste or other lands in the royal forests which do not exceed in value in any one instance the sum of £1,000, or rights or interests of little value to the Crown, which the Crown has (*s*) over land in the royal forests the property of the subjects of the Crown, or rights of forest, free chase, and free warren in or belonging to the royal forests independent of, and not being appurtenant to, any existing manor or lordship (*t*).

Gravel etc. not to be taken.

385. Surveyors of turnpike roads or highways, or any other persons, may not dig, get, or carry away stone or gravel or other

(*p*) *Re Thomas, Ex parte Commissioners of Woods and Forests* (1888), 21 Q. B. D. 380; Dean Forest Amendment Act, 1861 (24 & 25 Vict. c. 40), ss. 1, 4.

(*q*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 96. In such leases the annual rent to be paid to the Crown is that which to the Commissioners of Woods may seem reasonable and proper (*ibid.*). This provision is repealed, as regards purprestures in the Forest of Dean in the county of Gloucester, by s. 14 of the statute 1 & 2 Vict. c. 42. But all the provisions of the Crown Lands Act, 1829, as regards encroachments or trespasses made, or from the 27th July, 1838, to be made or continued in the said forest, are to remain and be in full force.

(*r*) To which the Crown Lands Act, 1829 (10 Geo. 4, c. 50), relates.

(*s*) The rights and interests which the Crown had on the 19th June, 1829 (the passing of the Crown Lands Act, 1829), or may have subsequently to that date. As to the application of moneys received by the Commissioners of Woods in respect of any sales, exchanges, or leases in any of the royal forests, see p. 127, *ante*.

(*t*) Such sales and exchanges to be carried into effect as directed by the Crown Lands Act, 1829, with respect to other parts of the land revenues of the Crown to which such Act relates (*ibid.*, s. 98). As to sales generally of Crown lands, see p. 157, *ante*; and as to exchanges, see p. 169, *ante*; as to restrictions on sales, leases, and exchanges of royal forests, parks, and chases in England (*ibid.*, s. 34), see p. 157, *ante*.

SECT. 2. Surrendered Revenues arising from Crown Lands.

materials for the making or repairing of roads or ways, or for any other purpose, in or from the forests, woods, or woodlands of the Crown without the consent in writing of the Commissioners (*u*).

Settlement of disputed claims of Crown.

386. Doubtful or disputed rights or claims of the Crown to forestal rights may be adjusted or settled by the Commissioners, with the consent of the Crown, and by warrant from the Treasury (*x*).

New Forest—Military Lands Act.

387. The Military Lands Act, 1892 (*y*), does not authorise the taking of land in the New Forest, and does not give power to the Commissioners to grant or lease or give licences over such land.

Licences to hunt etc.

388. The Commissioners, with the approval of the Treasury, may grant licences to any person to hunt, hawk, fish and fowl on and over any parts of the New Forest and Forest of Dean the soil and freehold of which is vested in the Crown subject and according to the provisions in force relative to licences by the Commissioners (*a*).

Game Act, 1831, not to affect rights.

389. The Game Act, 1831 (*b*), does not defeat or diminish any reservation, exception, covenant, or agreement prior to the 5th October, 1831 (*c*), contained in any private Act of Parliament, deed, or other writing relating to the game upon any land, nor prejudice the rights of any lord or owner of any forest, chase, or warren, or of any lord of a manor, lordship, or royalty, or reputed manor, lordship, or royalty, or of a steward of the Crown of a manor, lordship, or royalty appertaining to the Crown (*d*); nor does it alter or affect the prerogative rights or privileges of the Crown, or the powers or authorities vested in the Commissioners in the forests of the Crown, or their boundaries, or in the appointment of stewards, gamekeepers, or other officers of the forests, parks, or chases, or of any hundred, honor, manor, or lordship being part of the possessions and land revenues of the Crown, or certain other rights, privileges, or immunities in such forests etc., or the rights or privileges of persons holding under grants or purchases from the Crown; nor does it give to lords of manors or other persons within forests or their boundaries any privileges, rights, or powers which

(*u*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 106. This section was repealed in part (to "passing of this Act") by the Statute Law Revision (No. 2) Act, 1888 (51 & 52 Vict. c. 57), but the repeal does not affect the above statement.

(*x*) See p. 155, *ante*.

(*y*) 55 & 56 Vict. c. 43, s. 24; and see p. 202, *post*.

(*a*) Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 5; in exercise of any powers by law vested in such Commissioners to grant licences to hunt, hawk, fish or fowl upon or over any forest belonging to the Crown and under the management of such Commissioners. No such licence operates as a lease or demise notwithstanding anything contained in the Act. S. 9 of the New Forest Act, 1851 (14 & 15 Vict. c. 76), empowering the Crown to grant licences to sport over the New Forest, is repealed by this Act. The other statutes relating to the New Forest and the Forest of Dean are stated in note (*k*), p. 185, *ante*.

(*b*) 1 & 2 Will. 4, c. 32.

(*c*) The date of the passing of the Game Act, 1831 (1 & 2 Will. 4, c. 32).

(*d*) *Ibid.*, s. 8. As to the provisions relating to the game generally, see see title GAME.

they did not possess or to which they were not entitled before the 5th October, 1831 (*e*).

390. The lord or steward of the Crown of every manor, lordship, or royalty (*f*) has the right of killing the game upon the wastes or commons within such manor, lordship, or royalty, and to authorise persons who have obtained an annual game certificate (*g*) to enter upon such wastes or commons for the purpose of pursuing and killing the game thereon (*h*).

Right to game on wastes of Crown manors.

A right of lopwood (*i*) lying within a manor cannot be created by custom or prescription, or otherwise than by Crown grant or Act of Parliament (*k*).

Right of lopwood.

Where waste land had been allotted under an Inclosure Act, and in respect of it a prescriptive claim was made to a right of common in the waste and to a right of pannage in the open woods of the New Forest, the claim was disallowed, as it could not have had a legal origin in a grant from the Crown (*l*).

Owners and occupiers of lands, as against the lords of the several manors in the forest, are entitled to common of pasturage for cattle, levant and couchant, on their respective tenements over all waste lands of the forest, and inclosures of such lands will be restrained (*m*).

Pasturage, right of.

A commoner who objects to the proceedings of the owners of the forest and destroys their notice boards may be convicted before justices (*n*).

Destroying notice boards.

(*e*) The date of the passing of the Game Act, 1831 (1 & 2 Will. 4, c. 32); but such prerogatives, immunities, privileges, rights, and powers remain as if such Act had not been passed. The provisions of the Game Act, 1831, as to trespassers do not (*inter alia*) apply to gamekeepers appointed within the limits of free warren or free chase, nor to lords or stewards of the Crown of manors, lordships, or royalties, or reputed manors, lordships, or royalties, nor to gamekeepers appointed by such lords or stewards within the limits of such manor, lordship, or royalty (*ibid.*, s. 35). And generally, as to trespassers in search of game on Crown lands, see *ibid.*, ss. 30—36.

(*f*) Or reputed manor, lordship, or royalty.

(*g*) The term "game certificate" means a licence to kill game under the provisions of the Game Licences Act, 1860 (23 & 24 Vict. c. 90).

(*h*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 10. The Act does not affect the rights or privileges which lords of manors, lordships, or royalties, or reputed manors, lordships, or royalties, or stewards of the Crown of manors, lordships, or royalties, belonging to the Crown had before 5th October, 1831 (the date of the passing of the Act), exercised over such wastes or commons.

(*i*) That is, a right for the inhabitants of a parish to lop for fuel the branches of trees growing upon the waste lands of a manor at certain times of the year.

(*k*) *Chilton* v. *London Corporation* (1878), 7 Ch. D. 735; *Willingale* v. *Maitland* (1867), L. R. 3 Eq. 103; as to presumption from proof of user by inhabitants, see *Rivers* (*Lord*) v. *Adams* (1878), 3 Ex. D. 361; *Goodman* v. *Saltash Corporation* (1882), 7 App. Cas. 633, 637; as to the right of cutting brakes, litter etc., see *De la Warr* (*Earl*) v. *Miles* (1881), 17 Ch. D. 535, and Vol. VI., p. 484.

(*l*) *Mills* v. *New Forest Commissioner* (1856), 18 C. B. 60.

(*m*) *Sewers Commissioners* v. *Glasse* (1874), L. R. 19 Eq. 134; (1872) 7 Ch. App. 456; and see *Howard* v. *Maitland* (1883), 11 Q. B. D. 695; *Sewers Commissioners of City of London* v. *Gellatly* (1876), 3 Ch. D. 610; as to the question of sufficiency of common where no deer had been turned on the waste for upwards of twenty years, see *Lake* v. *Plaxton* (1854), 10 Exch. 196; and Manwood, Forest Laws, tit. Fence Month.

(*n*) *R.* v. *Alcock*, *Ex parte Chilton* (1878), 37 L. T. 829.

SECT. 2. Surrendered Revenues arising from Crown Lands.

Ashdown Forest—right of pasturage etc.

391. Ashdown Forest, also known as Lancaster Great Park, in Sussex, of which the Crown was seised in right of the Duchy of Lancaster, except during the period of the Commonwealth, was disafforested by letters patent of King Charles II. and by him granted in 1677 to the Earl of Dorset and others. The right of the commoners over a certain portion of this forest is limited to common of pasturage and herbage, and does not include the right to cut and carry away the brakes, fern, heather, and litter growing therein, but such right can be acquired by prescription (*o*).

Disobedience of order.

392. Disobedience to an order of the Epping Forest Commissioners made under the Epping Forest Amendment Act, 1872 (*p*), has been held to be a misdemeanour at common law (*q*).

Hainault Forest.

393. The award of the Commissioners relating to the extent of the forest of Hainault, the allotments to the Crown, fuel assignments etc., are set out in the Hainault Forest Act, 1858 (*r*).

New Forest—Inclosure of lands.

394. No part of the New Forest in the county of Southampton, or of the Forest of Dean in the county of Gloucester, is land (*s*) subject to be inclosed under the Inclosure Act, 1845 (*t*).

(12) *Osborne Estate.*

Osborne estate.

395. The Osborne estate in the Isle of Wight now forms part of the hereditary revenues of the Crown and has ceased to be part of the private estates of the Sovereign (*a*).

(*o*) *De la Warr* (*Earl*) v. *Miles* (1881), 17 Ch. D. 535. As to presumption of Crown grants generally, see Vol. VI., p. 483; *Dawson* v. *M'Groggan*, [1903] 1 I. R. 92 (lost grant presumed). As to prescription generally, see title EASEMENTS AND PROFITS À PRENDRE.

(*p*) 35 & 36 Vict. c. 95, s. 5.

(*q*) *R.* v. *Walker* (1875), L. R. 10 Q. B. 355.

(*r*) *Re Hainault Forest Act*, 1858 (1861), 9 C. B. (N. S.) 648; as to extents and surveys being admissible, see p. 198, *post*.

(*s*) Land subject to be inclosed under the Inclosure Act, 1845 (8 & 9 Vict. c. 118), is described in s. 11 of that Act; see title OPEN SPACES AND RECREATION GROUNDS.

(*t*) *Ibid.*, s. 13. This section, so far as relates to the portions of the Forest of Dean called Walmore Common in the parish of Westbury-on-Severn and the Bearce Common in the parish of Saint Briavels, is repealed by the Dean Forest (Walmore and the Bearce Commons) Act, 1866 (29 & 30 Vict. c. 70). The powers of the Inclosure Commissioners are now transferred to the Board of Agriculture and Fisheries; see note (*s*), p. 170, *ante*. The inclosure (and the provisions for that purpose) of the various forests, or parts of them, are dealt with under the local Acts which are enumerated in note (*k*), p. 185, *ante*. The other statutes relating to the New Forest and the Forest of Dean are set out in the same note.

New Forest.—A tabular arrangement of the admeasurement and value of manors and other landed property within and adjacent to the New Forest at the time of Edward the Confessor, and after the afforestation by William the Conqueror, will be found in Lewis on Forests, 1811 ed., pp. 173 *et seq.*

(*a*) Osborne Estate Act, 1902 (2 Edw. 7, c. 37). The Crown Lands Acts, 1829 to 1894, apply to the Osborne estate, but parts of the estate are under the management of the Commissioners of Works as if it had been committed to their management under s. 22 of the Crown Lands Act, 1851 (14 & 15 Vict. c. 42); and arrangements may at any time be made, with the consent of the Treasury, for placing any part of the Osborne estate under such management

(13) *Miscellaneous.*

(a) *Agricultural Holdings and Small Holdings and Allotments.*

396. The Agricultural Holdings Act, 1908 (*b*), applies to land belonging to the Crown in right of the Crown.

For the purposes of that Act the Commissioners of Woods, or other the proper officer or body having charge of the land for the time being, or, in case there is no such officer or body, then such person as the Crown may appoint in writing under the Royal Sign Manual, represents the Crown and is deemed to be the landlord.

Agricultural Holdings Act, 1908.

The power of the Treasury to direct the cost of certain improvements to be charged to capital and repaid out of income (*c*) extends to any compensation payable by the Commissioners in respect of an improvement comprised in Part I. or Part II. of the First Schedule to the Act (*d*).

Any compensation payable by the Commissioners in respect of an improvement comprised in Part III. of the First Schedule to the Act (*e*) is to be paid as part of the expenses of the management of the land revenues of the Crown (*f*).

In the case of a holding in respect of which it is agreed in writing on or after 1st January, 1896, that the holding is let or treated as a market garden, the provisions of the Act (*g*) apply as if the improvements comprised in the Third Schedule (*h*) to the Act were comprised in Part III. of the First Schedule to the Act, provided that, in the case of Crown lands, compensation in respect of an improvement comprised in paragraphs (1), (2), and (5) of the Third Schedule must be paid in the same manner and out of the same funds as if it was an improvement comprised in Part I. of the First Schedule (*i*).

Market gardens.

or for withdrawing any part from such management as appears convenient at the time.

As a memorial to Her late Majesty Queen Victoria, the Commissioners of Works are directed, during His Majesty King Edward VII.'s pleasure, to preserve, so far as may be, in its present condition, and keep open to the public, in such manner and on such terms as the Commissioners, with the approval of the Sovereign, determine, such part of Osborne House as appears to have been in the personal occupation of Her late Majesty; certain directions are given in the Act as to the rest of the Osborne estate.

The Act operates to discharge the Osborne estate from all limitations, powers, and provisions to which it is subject; but does not affect any of the land reserved for the private use of members of the Royal Family, or any grant or lease existing on 18th December, 1902 (the date of the commencement of this Act), and affecting any part of the Osborne estate.

(*b*) 8 Edw. 7, c. 28. As to agricultural holdings generally, see title AGRICULTURE, Vol. I., p. 237.

(*c*) Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 1.

(*d*) See title AGRICULTURE, Vol. I., p, 258, for these improvements.

(*e*) See title AGRICULTURE, Vol. I., p. 261, note (*k*).

(*f*) 8 Edw. 7, c. 28, s. 37. As to the application of this Act to land of the Duchy of Lancaster, see p. 235, *post;* and to land of the Duchy of Cornwall, p. 255, *post.*

(*g*) 8 Edw. 7, c. 28.

(*h*) See title AGRICULTURE, Vol. I., p. 269.

(*i*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 42 (1) (i.) (a).

SECT. 2. Surrendered Revenues arising from Crown Lands.

The Commissioners, with the consent of the Treasury, may lease land belonging to the Crown to a council for the purposes of small holdings or allotments for a term not exceeding thirty-five years, either with or without a right of renewal of the tenancy for a term of not less than fourteen or more than thirty-five years (*k*).

(b) *Bridges.*

Small holdings and allotments.

Commissioners may convey bridges.

397. The Commissioners may (*l*) convey to a bridge authority (*m*) willing and able to accept such a conveyance, bridges (*n*) and land required for widening or improving them, either unconditionally or subject to conditions and terms, as may be agreed upon between the Commissioners and the bridge authority, notwithstanding anything in the Crown Lands Acts, 1829 to 1894, to the contrary (*o*).

The Commissioners when in occupation of a bridge as servants of the Crown are not liable to be rated to the relief of the poor, although authorised to take tolls (*p*).

(c) *Churches, Parsonages, Hospitals, Cemeteries etc.*

Sites for churches etc.

398. The Crown may by deed or writing under the Great Seal, or under the seal of the Duchy and County Palatine of Lancaster, give, grant, and vest in persons, or bodies politic or corporate, and their heirs and successors respectively, lands or tenements within the survey of the Exchequer or of the Duchy of Lancaster (not exceeding five acres in one grant) for erecting, rebuilding, repairing, purchasing, or providing a church or chapel, where the liturgy and rites of the Church of England are used or observed, or a mansion-house for the residence of a minister officiating in such church etc., or for outbuildings, offices, churchyard, or glebe for the same, the consent of the ordinary being first obtained (*q*).

Such a grant does not override any customary rights other than rights of common and manorial rights of a like nature, and therefore does not affect a customary right to a part of the waste, such as a village green (*r*).

(*k*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 40. For Allotments, see that title, Vol. I., 331; for Small Holdings, see that title.

(*l*) Under and in accordance with the Crown Lands Acts, 1829 to 1894, and notwithstanding anything in those Acts.

(*m*) For the purposes of s. 6 of the Crown Lands Act, 1906 (6 Edw. 7, c. 28), the expression "bridge authority" means any local authority having the duty of the care and maintenance of bridges, and "bridge" includes the approaches to and abutments of a bridge (*ibid.*, s. 6 (2)).

(*n*) Under the management of the Commissioners of Woods.

(*o*) *Ibid.*, s. 6. As to bridges generally, see title HIGHWAYS, STREETS AND BRIDGES.

(*p*) *R.* v. *McCann* (1868), L. R. 3 Q. B. 677, Ex. Ch.; *Graham* v. *Works Commissioners*, [1901] 2 K. B. 781, 791.

(*q*) Gifts for Churches Act, 1811 (51 Geo. 3, c. 115), s. 1. The lands or tenements may be so held by such persons etc. for those purposes notwithstanding the Mortmain Acts or the Crown Lands Act, 1702 (1 Ann. c. 1; stat. 1, c. 7, Ruff.). The Gifts for Churches Act, 1811, does not alter or amend such of the provisions of the Gifts for Churches Act, 1803 (43 Geo. 3, c. 108), as are not specially mentioned in the Act. As to churches generally, see title ECCLESIASTICAL LAW. Grants or inclosures of common made under the Gifts for Churches Act, 1811 (and other Acts mentioned in the schedule) are restricted by the Commons Act, 1899 (62 & 63 Vict. c. 30), s. 22, and Sched. I.; see title COMMONS, Vol. IV., at p. 510.

(*r*) *Forbes* v. *Ecclesiastical Commissioners for England* (1872), L. R. 15 Eq. 51.

SECT. 2. Surrendered Revenues arising from Crown Lands.

The principal officer of a public department holding lands or hereditaments (*s*) on behalf of the Crown, or otherwise for the public use or the use of such department (*t*), may grant and convey or release, either by way of voluntary gift or of sale, to the Governors of Queen Anne's Bounty, in fee simple or otherwise, such lands or hereditaments to be used as parsonages or residences for incumbents of benefices, or the outbuildings, yards, gardens, or their appurtenances, or as sites or for enlarging sites for the same (*u*).

Sale of Crown livings.

399. The Lord Chancellor (*x*) may sell and convey the advowsons of certain livings (*a*) in the manner, for the considerations, and subject to the regulations of the Lord Chancellor's Augmentation Act, 1863 (*b*); and may direct that part of the purchase-money of an advowson, but not exceeding the sum of £500, may be applied for the purpose of purchasing, building, or rebuilding a parsonage house on the living, but an equal sum must be paid for the same purpose by the incumbent or owner of the advowson (*c*).

Donations of money.

400. Donations of money for religious or educational purposes connected with land under the management of the Commissioners, or for the purpose of a hospital, infirmary, or cemetery, may be made by them, with the consent of the Treasury, out of the income of the land revenues of the Crown (*d*).

(*s*) Messuages, buildings, lands, tenements, or hereditaments.

(*t*) As to other persons, corporations etc., authorised by the Parsonages Act, 1865 (28 & 29 Vict. c. 69), to convey houses and lands to such governors by way of gift or sale for parsonages, and as to the provisions generally, see title ECCLESIASTICAL LAW.

(*u*) Gifts for Churches Act, 1811 (51 Geo. 3, c. 115), s. 4. The assurances may be made according to the form contained in s. 20 of Queen Anne's Bounty Act, 1838 (1 & 2 Vict. c. 20), or as near to it as the case may admit, or in any other form which the Governors may approve; but no such assurances from the same body or persons otherwise than upon a sale for fair value may comprise (including the site of buildings) more than one acre, and upon assurances by way of sale the purchase-money may be paid to the vendors or as they appoint, and their receipt is a sufficient discharge. In the case of a sale for more than £20 by a tenant for life or other person having only a partial estate, the purchase-money must be paid to and applied by two trustees in manner provided by s. 71 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). As to the provisions of that Act, see title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 1. The power of the Crown to grant ground for the site of a church or chapel, cemetery or burial ground, or for the residence of a spiritual person who may serve such church or chapel, or for the site of a parochial or district school, to an amount not exceeding five acres, under the Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 45, was repealed by the Crown Lands Act, 1894 (57 & 58 Vict. c. 43), s. 5 (1); see also the Crown Lands Act, 1885 (48 & 49 Vict. c. 79), s. 6.

(*x*) The term "Lord Chancellor" includes the Lord Keeper and Commissioner of the Great Seal (Lord Chancellor's Augmentation Act, 1863 (26 & 27 Vict. c. 120), s. 37).

(*a*) The advowsons mentioned in this Act are those of the several livings included in the First Schedule to the Act, which, so far as it related to certain named benefices, was repealed by the Statute Law Revision Act, 1893 (56 Vict. c. 14), s. 1, and Schedule.

(*b*) 26 & 27 Vict. c. 120, s. 1.

(*c*) *Ibid.*, s. 8.

(*d*) Crown Lands Act, 1894 (57 & 58 Vict. c. 43), s. 5. This section repealed s. 45 of the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and ss. 3—5 of the

SECT. 2.

(d) *Copyholds.*

Surrendered Revenues arising from Crown Lands.

Commissioners may purchase copyholds.

401. The Commissioners of Woods, with the consent of the Treasury, may contract for and purchase lands or hereditaments of copyhold or customary tenure which adjoin to or are intermixed with, or desirable to be held with, freehold hereditaments vested in the Crown (*e*). Lands so purchased are to be surrendered and vested in trustees for the Crown (*f*).

Crown lord of manor.

402. The legal estate in hereditaments of copyhold or customary tenure is not vested in the Commissioners, but the Crown is still lord of the manor (*g*).

Enrolment

403. When the freehold of copyhold or customary tenements of a manor belonging to the Crown is sold (*h*) by the Commissioners for the purpose of enfranchising such copyhold or customary tenements, or manorial rights parcel of a manor belonging to the Crown are sold by the Commissioners, the deed or instrument by which the sale is effected must be enrolled in the court rolls of such manor (*i*).

Rights of persons under a will etc.

Upon such a sale by the Commissioners to a tenant (whether there has been a conditional surrender or not) the right of persons in copyhold or customary tenements or lands subject to such manorial rights under a will, settlement, mortgage, or otherwise, continues to attach upon the tenement or land as if the freehold were comprised in, and had been devised, conveyed, charged, or otherwise disposed of by, the will, settlement, mortgage, or other instrument or disposition under which such person claims (*k*).

Crown Lands (Scotland) Act, 1835 (5 & 6 Will. 4, c. 58), authorising the grant of lands for churches, chapels, and other purposes.

(*e*) Crown Lands Act, 1841 (5 Vict. c. 1), s. 5.

(*f*) *Ibid.*, ss. 6, 7. A declaration of trust together with an authenticated copy of the surrender and admittance are to be enrolled in the Office of Land Revenue Records and Enrolments, and a minute or docket of the same entered in the office of such Commissioners. The provisions of the Crown Lands Act, 1829 (10 Geo. 4, c. 50), as to purchasing, selling, leasing, or exchanging any part of the possessions and land revenues of the Crown apply to lands of copyhold or customary tenure. As to the general provisions relating to copyholds, see title COPYHOLDS.

(*g*) *R.* v. *Powell* (1841), 1 Q. B. 352 ; *Nurse* v. *Seymour* (*Lord*) (1851), 13 Beav. 254; Fry on Specific Performance (1903 ed.), p. 110. See also title SPECIFIC PERFORMANCE.

(*h*) Under the powers given by the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and, *semble*, by any subsequent statutes affecting the same.

(*i*) *Ibid.*, s. 69. The enrolment is to be made by the steward of the manor (or by his deputy) upon production to him of the deed or instrument of sale. The steward or deputy steward, having enrolled the certificate and receipt or other instrument, must attest the same under his hand and return it to the purchaser. The provision as to sales by the Commissioners of Woods (under the powers of the Crown Lands Act, 1829 (10 Geo. 4, c. 50), and Acts amending it) to copyhold tenants for purpose of enfranchisement is amended by s. 4 of the Crown Lands Act, 1885 (48 & 49 Vict. c. 79). As to the enrolments of instruments for the purpose of preserving a record of enfranchisement of lands held of manors vested in the Crown, see p. 195, *post*. As to the general provisions respecting the enrolment of deeds and instruments relating to Crown lands etc. in England and Wales, see p. 171, *ante*.

(*k*) Crown Lands Act, 1885 (48 & 49 Vict. c. 79), s. 4. The Copyhold Acts,

The purchaser in such a case may mortgage the fee simple of the tenement or land to secure the payment of the purchase-money, costs, and interest (*l*). The mortgage has priority over all mortgages, charges, and incumbrances affecting the land except tithe commutation rent-charge and statutory charges or rent-charges for drainage (*m*).

Enfranchisement—enrolment.

404. For the purpose of preserving a record of enfranchisements under the Copyhold Act, 1894 (*n*), of land held of manors vested in the Crown, the keeper of the records and enrolments must provide a book in which is entered a memorial of every deed of enfranchisement of such land, and of every grant of a rent-charge on the enfranchisement, and of every conveyance of land purchased with the enfranchisement money (*o*).

Compensation.

405. Where a manor (*p*) is vested in the Crown, in right of the Crown or of the Duchy of Lancaster, either in possession or in

1852 (15 & 16 Vict. c. 51) and 1858 (21 & 22 Vict. c. 94), referred to in the margin to this section (s. 4), were repealed by the Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 100, Sched. III., with a proviso that all awards, deeds, orders, certificates, scales, instruments, charges, and rent-charges, made, executed, granted, created, or having effect under any enactment repealed by that Act should have effect as if that Act had not been passed.

(*l*) To the person advancing the same, his executors, administrators, and assigns.

(*m*) Crown Lands Act, 1885 (48 & 49 Vict. c. 79), s. 4. The mortgage may be made although the purchaser advances the money and has priority over all mortgages, charges, and incumbrances affecting such land (except tithe commutation rent-charge and statutory charges or rent-charges for drainage), notwithstanding the priority in date or anterior title of such mortgages, charges, and incumbrances, but such previous mortgages, charges, and incumbrances continue notwithstanding the mortgage under this section. No such charge has priority over mortgages, charges, or incumbrances which at the time of the passing of the Act (14th August, 1885) may affect the lands enfranchised without the consent of the Board of Agriculture and Fisheries.

(*n*) 57 & 58 Vict. c. 46. In the Act, unless the context otherwise requires, the expressions "admittance" and "enrolment" include every licence of any assurance and every ceremony, act, and assent by which the tenancy or holding of a tenant is perfected, and the expressions "admit" and "enrol" have corresponding meanings (*ibid.*, s. 94).

(*o*) *Ibid.*, s. 71 (1). The memorial, where it is a conveyance of land, is to be accompanied by a plan of the land (*ibid.*, s. 71 (2)). The memorial of any instrument under this section is to be signed by one of the parties (*ibid.*, s. 71 (3)). An instrument of which a memorial is required to be enrolled under this section does not take effect until a certificate has been written on it signed by the keeper of the records and enrolments (or by his deputy or assistant) that the memorial has been lodged at such office (*ibid.*, s. 71 (4)); and such certificate purporting to be so signed is admissible as evidence of the facts stated in it (*ibid.*, s. 71 (5)). A copy of the enrolment of the memorial is admissible as evidence of the deed or instrument or facts referred to in the memorial (*ibid.*, s. 71 (6)). The Treasury may direct what reasonable fees are to be paid for enrolments under this section, and the fees are expenses of the enfranchisement or purchase in respect of which the enrolment is made (*ibid.*, s. 71 (7)). For the list of fees on enrolment, see p. 138, *ante*. As to the provisions generally relating to fees for enrolments, searches, office copies etc., to be paid in respect of Crown lands as the Treasury appoints, see Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1), s. 22, and pp. 135, 172, *ante*.

(*p*) The expression "manor" includes a reputed manor (Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 94).

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remainder expectant on an estate less than an estate of inheritance, and either solely or in coparcenary with a subject, and the Commissioners of Woods or the Chancellor and Council of the Duchy of Lancaster, as the case may be, enter into negotiations for the enfranchisement (*q*) of land (*r*) held of the manor, and cannot agree with the tenant (*a*) as to the amount of consideration money to be paid (*b*) by him for the enfranchisement, the Commissioners or the Chancellor and Council of the Duchy, as the case may be, may on the request of the tenant, and on an agreement for the enfranchisement being entered into by them and the tenant, refer it to the Board of Agriculture and Fisheries to appoint a surveyor to determine the amount (*c*).

Joint tenancy etc.

406. A manor vested in the Crown, in right of the Crown, in possession, remainder, or reversion, in joint tenancy or coparcenary with a subject, may, so far as regards the rights and interests of the subject and of the tenant, be dealt with under the Copyhold Act, 1894 (*d*), and its provisions relating to enfranchisements in manors vested in the Crown, in right of the Crown, in remainder or reversion expectant on an estate of inheritance, apply so far as regards the share or interest of the Crown (*e*).

Voluntary enfranchisement.

407. A manor and land held of the manor where vested in the Crown, in right of the Crown, in remainder or reversion expectant on an estate of inheritance, may, with the written consent of the Commissioners of Woods, be dealt with (*f*) in respect to a voluntary enfranchisement (*g*).

(*q*) The expression "enfranchisement" includes (unless the context otherwise requires) the discharge of freehold lands from heriots and other manorial rights; and "heriot" includes a money payment in lieu of a heriot (Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 94).

(*r*) "Land" includes an undivided share in land (*ibid.*).

(*a*) As to what the expression "tenant" comprehends, see title COPYHOLDS.

(*b*) To the Commissioners or to the Receiver-General of the Duchy of Lancaster, as the case may be.

(*c*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 68 (1). On a reference being made under this section the Board of Agriculture and Fisheries must appoint a practical land surveyor for the purpose, and his award is final (*ibid.*, s. 68 (2)). The expenses incidental to such reference are to be treated as expenses on a compulsory enfranchisement at the instance of the tenant (*ibid.*, s. 68 (3)).

(*d*) 57 & 58 Vict. c. 46.

(*e*) *Ibid.*, s. 70.

(*f*) Under the provisions of the Copyhold Act, 1894 (57 & 58 Vict. c. 46), and subject to the provisions of s. 69 of that Act.

(*g*) *Ibid.*, s. 69 (1). When the consideration for an enfranchisement under this section is a gross sum, it is to be paid either to two trustees appointed for the purpose, one by the Commissioners of Woods and one by the person entitled to the rents and profits of the manor, or into court to the account of *ex parte* the Crown and the person so entitled (*ibid.*, s. 69 (2)). Money paid to trustees or into court under this section is to be applied in the purchase or redemption of the land tax affecting the manor or other land settled to the like uses as the manor, or in the purchase of land in fee simple convenient to be held with the manor, or in investment on Government or real securities, or in investments in which trustees are authorised to invest (*ibid.*, s. 69 (3)), the income of such investment to be paid to the person entitled to the rents and profits of the manor (*ibid.*, s. 69 (4)).

Where land is purchased with consideration money under this section, or

408. The provisions of the Copyhold Act, 1894 (*h*), with respect to compulsory enfranchisement do not apply to manors in which the Crown has any estate or interest in possession, reversion, or remainder (*i*).

Compulsory enfranchisement.

409. The provisions of the Copyhold Act, 1894 (*k*), relating to the grant of easements to a lord of a manor for mining purposes, the holding of customary courts although a copyhold tenant is not present, the making of grants or admittances out of the manor and out of court, the making of admittances without a presentment by the homage, the entry of surrenders and wills on the court rolls, and the partition of lands of copyhold or customary tenure, extend to manors and lands vested in the Crown in right of the Crown or of the Duchy of Lancaster (*l*). The provision relating to the grant of easements to the lord for mining purposes extends to an enfranchisement of land held of a manor vested in the Crown effected under the provisions of any existing Act of Parliament (*m*).

Application of Copyhold Act, 1894.

Indemnity.

410. Where lands or hereditaments of copyhold or customary tenure are purchased or taken in exchange by the Commissioners, and surrendered to or vested in a trustee on behalf of the Crown, all sums of money, fines, fees, rents, services, and heriots, costs, charges, damages, and expenses, payable by or recovered from or against such trustee (*n*), are to be borne and discharged by the

where the consideration consists of a rent-charge, the land or rent-charge is to be conveyed to the uses, on the trusts, and subject to the powers and provisions then affecting the manor, or as near thereto as circumstances permit (Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 69 (5)). On payment of the consideration where it is a gross sum of money, or on or before the execution of the conveyance of the rent-charge, where the consideration is a rent-charge, the Commissioners of Woods may join with the person entitled to the rents and profits of the manor in executing a deed of enfranchisement (*ibid.*, s. 69 (6)). The deed must state in what manner the enfranchisement money, if any, has been applied (*ibid.*, s. 69 (7)), and on its enrolment, made in manner provided by the Act, vests in the tenant all the estate, right, and interest of the Crown and of all other persons interested under the settlement of the manor in the land enfranchised, either absolutely or subject to the reservations, if any, in the deed (*ibid.*, s. 69 (8)).

A trustee appointed under this section by the Commissioners of Woods is indemnified by them out of the rents and profits of the possessions and land revenues of the Crown from costs and expenses incurred in the execution of the trusts, and of which he does not obtain repayment out of the trust moneys (*ibid.*, s. 69 (9)). As to the right of trustees of copyholds purchased by Commissioners etc. to be indemnified for fines etc. paid by them, see *infra*.

(*h*) 57 & 58 Vict. c. 46.

(*i*) *Ibid.*, s. 96.

(*k*) 57 & 58 Vict. c. 46.

(*l*) *Ibid.*, s. 98 (1).

(*m*) *Ibid.*, s. 98 (2). Save for the express provisions that have been dealt with, this Act does not apply to manors or land vested in the Crown in right of the Crown or of the Duchy of Lancaster, or extend to or prejudice the estate, right, title, privilege, or authority of the Crown in right of the Duchy of Cornwall or its possessions, or of the Duke of Cornwall for the time being (*ibid.*, s. 95 (f), (g)).

(*n*) His heirs, executors, or administrators, by reason of such surrender or

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Commissioners of Woods, and the trustee (*o*) is to be indemnified by them (*p*).

(e) *Crown Estate Paving Act*, 1851.

Application to Crown.

411. Neither the Crown Estate Paving Act, 1851 (*q*), nor any of the Acts recited in it (*r*), subject or charge the Crown (*s*) or the capital or income of the possessions or land revenues of the Crown in right of the Crown to or with the payment of any rate or assessment, sum of money, debt, or liability, or the performance of any contract or engagement made, entered into, or incurred, in relation to paving, lighting, cleansing, or watering under the authority of the Act, or the Acts recited in it, or any of them (*t*).

(f) *Evidence.*

Crown surveys etc. as evidence.

412. An ancient extent of Crown lands found in the proper office, and purporting to have been taken by a steward of such lands, and following in its construction the directions of the statute 4 Edw. 1, will be presumed to have been taken under competent authority, although the commission cannot be found (*u*); but a document purporting to be a survey of a manor founded on the presentment of the tenants is inadmissible either as a document made under public authority or as evidence of reputation (*a*).

Documents deposited in the Office of Land Revenue Records and Enrolments may be proved by examined copies, although the original purport to be the rental of a former grantee of the Crown. Expired leases by the Crown of lands or mines tendered in evidence as acts of ownership by the Crown are similarly provable by examined copies, although the originals may not have been enrolled in the proper time (*b*).

A document purporting to be a survey of a manor made while it

conveyance to him or of his admission as trustee for the Crown or of any subsequent surrender by him.

(*o*) His heirs, executors, or administrators, lands, tenements, goods, and chattels.

(*p*) Crown Lands (Copyholds) Act, 1851 (14 & 15 Vict. c. 46), s. 3. As to trustees, appointed by the Commissioners of Woods in the case of a voluntary enfranchisement under the Copyhold Act, 1894 (57 & 58 Vict. c. 46), being indemnified against costs etc. in the execution of their trust, see p. 197, *ante*.

(*q*) 14 & 15 Vict. c. 95.

(*r*) The Acts recited are 5 Geo. 4, c. 100; 6 Geo. 4, c. 38; 9 Geo. 4, c. 64; 2 & 3 Will. 4, c. 56.

(*s*) Heirs or successors.

(*t*) Crown Estate Paving Act, 1851 (14 & 15 Vict. c. 95), s. 35. This Act transferred the duties of paving, lighting etc., parts of the Crown estate in the district of Regent's Park and certain streets and places in Westminster from certain commissioners to the parishes, and transferred the jurisdiction of such commissioners to the Commissioners of Works.

As to the Town Gardens Protection Act, 1863 (26 & 27 Vict. c. 13), not extending to Crown property, see p. 208, *post*.

(*u*) *Rowe* v. *Brenton* (1828), 8 B. & C. 737, 747; S. C., 3 Man. & Ry. (K. B.) 133, 164. It is evidence of the title of the Crown to lands stated in it to have been purchased by the Crown of a subject (*Doe* d. *William IV.* v. *Roberts* (1844), 13 M. & W. 520).

(*a*) *Evans* v. *Taylor* (1838), 3 Nev. & P. (K. B.) 174; *Beaufort* (*Duke*) v. *Smith* (1849), 4 Exch. 450.

(*b*) *Doe* d. *William IV.* v. *Roberts*, *supra*.

was part of the possessions of the Crown, and coming out of the proper custody, is admissible as evidence of the boundaries and customs of the manor (*c*).

413. The conveyance of a manor by the Commissioners of Woods, on the part of the Crown, does not entitle the purchaser to maintain ejectment against the possessor of land inclosed from the waste of the manor more than twenty years before the conveyance without leave of the Crown (*d*).

Where a manor formerly belonged to the Crown, a grant and survey recorded in the Augmentation Office is not evidence for the tenants against the lord (*e*).

(g) *Factories and Workshops.*

Application of Factory and Workshop Act, 1901, to Crown.

414. The Factory and Workshop Act, 1901 (*f*), applies to factories and workshops belonging to the Crown; but in case of any public emergency the Secretary of State may by order, to the extent and during the period named by him, exempt from the Act any factory or workshop belonging to the Crown, or any factory or workshop in respect of work which is being done on behalf of the Crown under a contract specified in the order.

A factory or workshop belonging to or in the occupation of the Crown is not to be excluded from the operation of the Act by reason only that it is not carried on by way of trade or for the purpose of gain.

The powers conferred by the Act on a district council or other local authority must, in the case of a factory or workshop belonging to or in the occupation of the Crown, be exercised by an inspector under the Act (*g*).

(h) *Inclosure of Land.*

Application of Inclosure Act, 1845, to Crown land.

415. When the Crown is interested in land subject to be inclosed under the Inclosure Act, 1845 (*h*), the first Commissioner of Woods, or the Chancellor of the Duchy of Lancaster, according as the interest is in right of the Crown or the Duchy, or, when the Duke of Cornwall is so interested in such land, the Lord Warden of the Stannaries (*i*), is for the purposes of such Act to the extent of such respective interest to be substituted for the person so interested (*k*).

(*c*) *Smith* v. *Brownlow* (*Earl*) (1870), L. R. 9 Eq. 241. A survey taken by commission from the Crown, when seised of a manor, is admissible evidence to show what were the demesne lands of the manor at that time (*Dimes* v. *Arden* (1836), 6 Nev. & M. (K. B.) 494).

(*d*) *Doe* d. *Watt* v. *Morris* (1835), 2 Bing. (N. C.) 189.

(*e*) *Phillips* v. *Hudson* (1867), 2 Ch. App. 243.

(*f*) 1 Edw. 7, c. 22.

(*g*) *Ibid.*, s. 150. As to factories and workshops in general, see title FACTORIES AND WORKSHOPS.

(*h*) 8 & 9 Vict. c. 118, s. 11. As to the Inclosure Acts, 1845 to 1882, generally, see titles COMMONS, Vol. IV., p. 441; COPYHOLDS; HIGHWAYS, STREETS, AND BRIDGES; OPEN SPACES AND RECREATION GROUNDS.

(*i*) As to the exercise of powers relating to the Duchy of Lancaster, see p. 219, *post*; and as to those relating to the Duchy of Cornwall, see p. 246, *post*.

(*k*) Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 17, 18.

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Order of exchange.

Where a person interested (*l*) applies to the Board of Agriculture and Fisheries (*m*) for an order of exchange of land in which the Crown has an estate or interest, in right of the Crown, in reversion or remainder expectant upon the determination of an estate for life or other larger interest, the Board of Agriculture and Fisheries may make such order of exchange if the consent of the Crown is previously signified in writing by the Commissioners of Woods (*n*).

No part of the New Forest and Forest of Dean is land subject to be inclosed under the Inclosure Act, 1845 (*o*).

In case of doubt as to the amounts of rents or other payments to the Crown agreed to be apportioned, or as to the extent, identity, or boundaries of the lands charged etc., the Commissioners of Woods, with the consent of the Treasury, may refer it to the Board of Agriculture and Fisheries (*p*).

(i) *Infectious Diseases (Notification) Act*, 1889.

Infectious diseases notification.

416. The Infectious Diseases (Notification) Act, 1889 (*q*), does not extend to any building, ship, vessel, boat, tent, van, shed, or similar structure belonging to the Crown or to any inmate of the same (*r*).

(k) *Markets and Fairs.*

Power to abandon tolls.

417. The Commissioners, with the consent of the Treasury, may abandon or discontinue, either permanently or for a limited time, the collection of tolls or profits of markets or fairs belonging to the Crown, and may by deed relinquish and extinguish such tolls or profits (*s*).

Rights of Crown.

The Markets and Fairs Clauses Act, 1847 (*t*), or the special Act (*a*) is not to be deemed to extend to or affect any Act of Parliament relating to the Crown's duties of customs or excise, or any other revenue of the Crown, or to extend to or affect any claim of the Crown in right of the Crown, or otherwise, or any proceedings at law or in equity by or on behalf of the Crown in any part of the United Kingdom of Great Britain and Ireland (*b*).

(*l*) According to the definition in s. 16 of the Inclosure Act, 1845 (8 & 9 Vict. c. 118).

(*m*) The duties of the Inclosure Commissioners were transferred to the Board of Agriculture (now the Board of Agriculture and Fisheries) by the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2, Sched. I., Part II.; see p. 170, *ante*.

(*n*) Inclosure Act, 1857 (20 & 21 Vict. c. 31), s. 5. An order of exchange made with such consent is valid and binding on the Crown, and must be deposited in the Office of Land Revenue Records and Enrolments.

(*o*) See p. 190, *ante*.

(*p*) See p. 206, *post*.

(*q*) 52 & 53 Vict. c. 72.

(*r*) *Ibid.*, s. 15.

(*s*) Crown Lands Act, 1852 (15 & 16 Vict. c. 62), s. 6. This power may be exercised by the commissioners having the management of the tolls or profits of such markets or fairs by order of the Treasury.

(*t*) 10 & 11 Vict. c. 14.

(*a*) The expression "the special Act" used in this Act is to be construed to mean any Act which may, after 23rd April, 1847 (the date of the passing of the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14)), be passed authorising the construction or regulation of a market or fair, and with which this Act is incorporated (*ibid.*, s. 2).

(*b*) *Ibid.*, s. 54. As to markets and fairs generally, see title MARKETS AND FAIRS.

(l) *Metropolis Management.*

418. The Metropolis Management Act, 1855 (*c*), does not abridge, alter, or affect any right, power, exemption, or remedy of the Crown or the Commissioners of Works in, over, or in relation to the possessions of the Crown or of the public (*d*); and nothing in the Metropolis Management Amendment Act, 1862 (*e*), is to divest, take away, prejudice, diminish, or alter any estate, right, privilege, power, or authority vested in or enjoyed or exercisable by the Crown in right of the Crown; but nothing in this Act is in any way to lessen, alter, or in any manner prejudice or affect the rights, powers, and authorities of the London County Council (*f*) relating to the main drainage of the metropolis (*g*).

Saving of rights of Crown and public.

419. The London County Council or any borough or district council (*h*) may not take, use, or in any manner interfere with any land, soil, tenements, or hereditaments, or any rights of any nature, belonging to or enjoyed or exercisable by the Crown in right of the Crown, without the previous consent in writing of the Commissioners of Woods, or one of them, on behalf of the Crown (which consent such Commissioners are authorised to give).

Consent required.

(m) *Military Purposes, Taking Lands for.*

420. Land belonging to the Crown may be leased for military purposes (*i*) by the Commissioners of Woods, with the consent of the Treasury (*k*), for a term not exceeding twenty-one years, but the lease ceases if the land ceases to be used for military purposes (*l*).

Leases for twenty-one years.

(*c*) 18 & 19 Vict. c. 120.
(*d*) *Ibid.*, s. 241.
(*e*) 25 & 26 Vict. c. 102.
(*f*) The Metropolitan Board of Works is mentioned in the Act, but as to transfer of powers, see note (*n*), p. 236, *post*.
(*g*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 116.
(*h*) Metropolitan Board of Works, vestries, and district boards are mentioned in the Act, but their powers have now become vested in the bodies mentioned in the text; see note (*n*), p. 236, *post*.
(*i*) The expression "military purposes" includes rifle or artillery practice, the building and enlarging of barracks and camps, the erection of butts, targets, batteries, and other accommodation, the storing of arms, military drill, and any other purpose connected with military matters approved by the Secretary of State (Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 23).
(*k*) The Chancellor and Council of the Duchy of Lancaster by deed under the hand and seal of the Chancellor, attested by the clerk of the Council as to lands forming part of possessions of the Duchy of Lancaster, and by the Duke of Cornwall or other the persons for the time being having power to dispose of land belonging to the Duchy of Cornwall as to land forming part of possessions of that Duchy.
(*l*) Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 10 (1). Where land is vested in the Crown and under the management of commissioners or departments other than the Commissioners of Woods, and where held by a public department for the public service, such commissioners or department may exercise, as regards the land, the powers which under the Military Lands Act, 1892 (55 & 56 Vict. c. 43), may be exercised as to land belonging to the Crown by the Commissioners of Woods (*ibid.*, s. 10 (2)).

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The Commissioners of Works may lease to a Secretary of State or to a territorial battalion for military purposes such portions of the royal parks, gardens, and possessions as are under their management for a term not exceeding twenty-one years (*m*); but such leases are revocable by the Sovereign (*n*).

New Forest.

421. The Military Lands Act, 1892 (*o*), does not authorise the taking of land in the New Forest, nor empower the Commissioners of Woods to grant, or lease, or give licences over land in the New Forest (*p*).

Where an Order in Council authorises the execution of military manœuvres, a draft of such Order in the case of the New Forest is to be sent to the court of verderers (*q*).

Defence of the realm.

422. The Defence Act, 1842 (*r*), does not extend to vest in the Secretary of State for War or his successors in any manner or for any purpose lands or hereditaments (*s*) part of the hereditary possessions and land revenues of the Crown in right of the Crown, or of the Duchy of Lancaster, or to divest, defeat, destroy, lessen, abridge, impair, or in any manner abrogate, diminish, or prejudice the estate, right, title, interest, power, or authority of the Crown in, to, out of, or over any part of such hereditary possessions or land revenues, notwithstanding the same or any part thereof may have been before the 10th August, 1842 (*t*), set apart or may after that date be permitted to be set apart for the use and service or placed under the charge of the Secretary of State for War or other departments, or of any persons acting under the authority of or in trust for the Crown or any of its predecessors, for the use and service of such departments or for military defences or otherwise howsoever (*u*).

(*m*) And subject to conditions as such Commissioners think fit.

(*n*) Military Lands Act, 1892 (55 & 56 Vict. c. 43), s. 10 (3). See, further, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 158.

(*o*) 55 & 56 Vict. c. 43.

(*p*) *Ibid.*, s. 24. This Act does not prevent the Secretary of State from proceeding to acquire lands in the New Forest for the purposes of this Act by provisional order, but no such provisional order is of effect until the provisions of s. 2 of this Act with respect to the taking of lands by the Secretary of State have been complied with.

(*q*) Military Manœuvres Act, 1897 (60 & 61 Vict. c. 43), s. 1.

(*r*) 5 & 6 Vict. c. 94; the Defence Acts, 1842 to 1873 (5 & 6 Vict. c. 94; (1854), 17 & 18 Vict. c. 67; (1859), 22 Vict. c. 12; (1860), 23 & 24 Vict. c. 112; (1865), 28 & 29 Vict. c. 65; (1873), 36 & 37 Vict. c. 72), this being the collective title given by the Short Titles Act, 1896 (59 & 60 Vict. c. 14).

(*s*) Messuages, buildings, castles, forts, lines, or other fortifications, manors, lands, tenements, or hereditaments.

(*t*) The date of the passing of the Defence Act, 1842 (5 & 6 Vict. c. 94).

(*u*) *Ibid.*, ss. 39, 40. The Defence Act, 1842 (5 & 6 Vict. c. 94), was amended by the transfer of the powers of the Board of Ordnance to the Secretary of State for War by the Ordnance Board Transfer Act, 1855 (18 & 19 Vict. c. 117), s. 1. The Defence Act, 1842, or any of the Acts recited or referred to in it, do not extend nor are to be deemed or construed to extend to or repeal, alter, or affect the Crown Lands Act, 1829 (10 Geo. 4, c. 50), or the Crown Lands Act, 1832 (2 & 3 Will. 4, c. 1). See, further, title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI.

(n) *Mines.*

SECT. 2. Surrendered Revenues arising from Crown Lands.

423. The Commissioners of Woods (*v*) may sell (*x*), purchase (*y*), exchange (*z*), or lease (*a*) any mines, minerals, quarries, or collieries (or any part of them), being part of the possessions and land revenues of the Crown; and may sell any part of them to raise money for the redemption of the land tax charged on any Crown lands (*b*). Commissioners may sell etc. mines.

424. The Commissioners, with the consent of the Treasury, may grant or enter into agreements to grant leases of mines (*c*), minerals, or other metallic or non-metallic substances or substrata obtained by mining, quarrying, or excavating, for a term not exceeding sixty-three years from the time of granting the lease or from the date of the agreement, as the case may be, or for a term of years, which, with any term of years in existence at the time of granting the lease or at the date of the agreement, will together make up a term not exceeding sixty-three years from such time or date. Leases for sixty-three years.

Such leases or agreements may be made upon conditions and may contain reservations by way of, or wholly or partially in lieu of, rent or other consideration, and with such covenants and stipulations as the Commissioners, with the consent of the Treasury, may approve (*d*).

The above-mentioned powers and provisions relating to the granting by the Commissioners of mining leases for sixty-three years do not apply to any mine of gold or silver (*e*). Gold and silver mines.

425. An annual rent in money, or an annual rent in money and such share of the produce in kind, or such rent or duty upon Reservation of rent.

(*v*) As to the powers of granting, leasing etc., under Acts prior to the passing of the Crown Lands Act, 1829 (10 Geo. 4, c. 50), see p. 147, *ante*. Where the consent of the Treasury is required, it is so stated either in the text or notes.

(*x*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 34. See p. 157, *ante*.

(*y*) *Ibid.*, s. 52. See p. 158, *ante*.

(*z*) *Ibid.*, ss. 42—44. See p. 169, *ante*.

(*a*) *Ibid.*, ss. 22 *et seq.* See p. 161, *ante;* and as to the extension of the powers of leasing by subsequent statutes, see note (*c*), *infra*.

(*b*) *Ibid.*, s. 59. See p. 179, *ante*. As to what is comprised in the expression "the possessions and land revenues of the Crown," see note (*a*), p. 151, *ante*. As to mines, minerals, and quarries generally, see title MINES, MINERALS, AND QUARRIES.

(*c*) The powers of leasing given by the Crown Lands Act, 1829 (10 Geo. 4, c. 50), ss. 22 *et seq.*, are extended by the Crown Lands Act, 1873 (36 & 37 Vict. c. 36), s. 4, to enable the Commissioners to grant or enter into any agreement to grant mining leases for sixty-three years. Authorities or licences as well as leases may be granted. See p. 204, *post*.

(*d*) *Ibid.*, s. 4. S. 7 of this Act is a general saving clause to all persons and bodies politic or corporate, and their respective heirs, executors, administrators, and assigns (except in the cases already provided for or intended to be provided for in the Act) of all estates, rights, titles, and interests which they had at the time of the passing of the Act or might or could have had if the Act had not passed. As to the powers of granting leases generally for thirty-one years etc. (Crown Lands Act, 1829 (10 Geo. 4, c. 50), ss. 22 *et seq.*), see p. 161, *ante*.

(*e*) Crown Lands Act, 1873 (36 & 37 Vict. c. 36), s. 4. Gold and silver mines, and the Crown's rights in respect of those and other mines and the decided cases relating thereto, are dealt with at p. 116, *ante*.

SECT. 2. Surrendered Revenues arising from Crown Lands.

the quantity or value of such produce, may be reserved in leases of mines, collieries, or quarries, as the Commissioners of Woods may think proper (*f*).

Waste.

426. In the case of leases of mines, minerals, quarries, or collieries, a lessee may be made dispunishable for waste, but not in the case of other Crown leases (*g*).

Consideration for leases.

427. On granting a lease of coal (*h*) or other such substances as ironstone or mineral, stone, slate, clay, gravel, sand, or chalk, or of any substance obtained by mining, quarrying, or excavating, or on granting any authority or licence (*i*) for the working of the same, or any licence for the making of an underlease, assignment, or other disposition of the interest of any person under such lease, authority, or licence, the Commissioners of Woods may, with the approval of the Treasury, receive, or agree to receive (in addition to any rent, royalty, or reservation), such sum of money as seems to them sufficient consideration for such lease, authority, or licence (*k*).

Foreshore.

428. The Crown Lands Act, 1866 (*l*), does not apply to beds, seams, or veins of coal or stone, or any metallic or other mineral substances in or under the foreshore, or to any mines or quarries thereof, and the same continues and is vested, held, and enjoyed as if that Act had not been passed (*m*).

Mining rights.

429. All persons entitled, in right of or under the Crown, to or to the management of beds, seams, veins, mines, or quarries (*n*) in or under the foreshore, or in or under any lands immediately adjacent thereto, and their respective tenants, may (*o*) take into possession, or use or pass through, over, or under, any portion of the foreshore under the management of the Board of Trade in order to make or sink pits, shafts, adits, drifts, levels, drains, watercourses, pools, or embankments; or to make, lay, place, use, and repair spoil-banks, roads, ways, brooks, and banks; or to make, erect, and repair lodges, shafts, steam and other engines, buildings,

(*f*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 33. This section was amended by the Crown Lands Act, 1873 (36 & 37 Vict. c. 36), s. 4. See p. 203, *ante*.

(*g*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 27. As to the general provisions to be observed in granting leases, see p. 163, *ante*. As a lessee of mines, minerals, quarries, or collieries may be made dispunishable for waste, a lease may be granted of new mines or collieries as well as of those already opened.

(*h*) Coal or other such substances as mentioned in s. 2 of the Crown Lands Act, 1866 (29 & 30 Vict. c. 62). That section (s. 2) was repealed by the Crown Lands Act, 1894 (57 & 58 Vict. c. 43), s. 3 (3). As to the law previously to the Crown Lands Act, 1866, see the Crown Lands Act, 1829 (10 Geo. 4, c. 50), ss. 28 *et seq.*

(*i*) As to the interest conferred by authorities or licences, and generally on the subject, see title MINES, MINERALS, AND QUARRIES.

(*k*) Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 3.

(*l*) 29 & 30 Vict. c. 62.

(*m*) *Ibid.*, s. 21.

(*n*) As mentioned in the Crown Lands Act, 1866 (29 & 30 Vict. c. 62).

(*o*) Subject to the provisions of the Crown Lands Act, 1866 (29 & 30 Vict. c. 62).

works, and machinery; or to do such other acts necessary or convenient for working, searching for, digging, raising, carrying away, dressing, or making merchantable the coal, stone, or other substances (*p*).

Necessary or proper works and conveniences for the safety and accommodation of the public must be made and maintained by the person exercising the powers conferred by the provisions of this Act (*q*).

Forests.

430. Leases may be granted by the Commissioners of part of the royal forests for making railways etc., and with a licence to get etc. stone, slate, coal, ore, or marl in such forests (*r*).

Enfranchisement—grant of easements.

431. The provisions of the Copyhold Act, 1894 (*s*), relating to the grant of easements to a lord of a manor for mining purposes, are extended to an enfranchisement of land held of a manor vested in the Crown effected under the provisions of any existing Act of Parliament (*a*).

(o) *Prescription Act*, 1832.

Application to Crown.

432. The Prescription Act, 1832 (*b*), extends to lands of the Sovereign, so far as regards rights of common or other profit or benefit (except tithes, rents, and services), and rights of way or other easements (except the access and use of light), and watercourses or the use of water (*c*).

(p) *Public Health Acts Amendment Act*, 1907.

Does not affect Crown.

433. Nothing in the Public Health Acts Amendment Act, 1907 (*d*), is to affect prejudicially any estate, right, power, privilege, or exemption of the Crown, and in particular does not

(*p*) Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 22, giving to the Board of Trade at least two months' previous notice in writing of the intention to exercise the powers of this section (stating the nature, extent, and duration of the proposed interference with the foreshore), and doing as little damage as possible, and making full compensation to all persons interested for damage sustained by them. The amount and application of such compensation for lands taken or injuriously affected is to be determined as provided by the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the Lands Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 19), or the Railways (Ireland) Act, 1851 (14 & 15 Vict. c. 70), and any Act amending those Acts respectively, as the case requires.

These powers, however, must not be exercised so as to, or be likely to, injure, weaken, or endanger any pier or other structure on or near the foreshore (Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 23).

(*q*) 29 & 30 Vict. c. 62, s. 24. By the general saving clause to this Act such estates, rights, titles, claims, and demands, as any persons, bodies politic or corporate, and their heirs, executors, administrators, successors, and assigns (other than the Crown in right of the Crown), had on the 6th August, 1866 (the date of the passing of the Act), or could have had if the Act had not been passed, are preserved (*ibid.*, s. 31).

(*r*) See p. 186, *ante*.

(*s*) 57 & 58 Vict. c. 46.

(*a*) See p. 197, *ante*.

(*b*) 2 & 3 Will. 4, c. 71.

(*c*) *Ibid.*, ss. 1, 2; and see Vol. VI., p. 485. As to prescription generally, see title EASEMENTS AND PROFITS À PRENDRE.

(*d*) 7 Edw. 7, c. 53.

SECT. 2. Surrendered Revenues arising from Crown Lands.

authorise a local authority (*e*) to take, use, or interfere with any portion of the shore or bed of the sea, or of any river, channel, creek, bay, or estuary, or lands, hereditaments, subjects, or rights of any description belonging to the Crown (*f*), without the consent in writing of the Commissioners of Woods or the Board of Trade, as the case may be, on behalf of the Crown (*g*).

(q) *Rates.*

Exemption from rates.

434. Property in the occupation of the Crown, or in that of persons using it exclusively for the service of the Crown, is not rateable (*h*).

The lands, tenements, and hereditaments of the Sovereign are in certain cases liable to sewers rate (*i*).

(r) *Rents and other Payments.*

Apportionment.

435. Where the Commissioners of Woods are satisfied that the owners of lands or hereditaments in England or Wales charged with fee-farm or other rent, or annual, periodical, or other certain payment to the Crown, either by express grant, prescription, or otherwise, have agreed to apportion such rent or other payment upon specific parts of such lands or hereditaments, such Commissioners may, by writing, confirm and agree to such apportionment (*k*).

Reference to Board of Agriculture and Fisheries.

In case of doubt as to the amount of the different parts of the rent or payment agreed to be apportioned, or as to the specific lands or hereditaments to be charged, or as to the extent, identity, or boundaries of the lands or hereditaments charged with the entire or original rent or payment or any part of it, or if there

(*e*) This expression means an urban sanitary authority, an urban district council, or a rural district council (7 Edw. 7, c. 53, s. 13).

(*f*) Under the management of the Commissioners of Woods or of the Board of Trade respectively.

(*g*) 7 Edw. 7, c. 53, s. 12, which consent the Commissioners or Board are respectively authorised to give.

In *Gorton Local Board of Health* v. *Prison Commissioners* (1887), reported [1904] 2 K. B. 165, n., it was held that, as there was no express mention or necessary implication of the Crown in the Public Health Act, 1875 (38 & 39 Vict. c. 55), neither the Act nor bye-laws made under the Act had any application to the Crown. See also *Cooper* v. *Hawkins*, [1904] 2 K. B. 164, and Vol. VI., p. 409.

(*h*) See p. 118, *ante*. As to rates generally, see title RATES AND RATING.

(*i*) See p. 120, *ante*.

(*k*) Crown Lands Act, 1852 (15 & 16 Vict. c. 62), s. 3. Every apportioned part of such rent or payment becomes a rent or payment issuing out of the apportioned lands or hereditaments, and is saleable as fee-farm rents or annual payments were then saleable. Any person entitled in possession to the rents and profits of lands or hereditaments charged with such rent or payment, in fee or tail, for life, or for an interest other than under a lease at rack-rent (and notwithstanding any mortgage or charge on such hereditaments), is the owner for the purpose of agreeing to an apportionment so made. Such apportionment, when reduced into writing, signed by the parties agreeing, and confirmed by the Commissioners, is, after enrolment in the Office of Land Revenue Records and Enrolments, binding against the Crown and all other persons. The enrolment is conclusive evidence that the provisions of the Act have been carried out. The powers relating to such apportionment may be exercised by the Commissioners having, under the order of the Treasury, the management of that part of the land revenues of the Crown which includes rents or payments so apportioned.

is no person whom the Commissioners agree to treat as owner (*l*), or in case any other difficulty arises in making the apportionment, such Commissioners may, with the consent of the Treasury, refer it to the Board of Agriculture and Fisheries (*m*) to make such apportionment (*n*).

Quit rents etc.

436. Quit-rents (*o*), vicecomital or viscontial (*p*) rents, and other rents or payments payable to the Crown in respect of honours, manors, lands, tenements, or hereditaments in England and Wales, form part of the land revenues of the Crown, and are under the management of the Commissioners (*a*).

Treasury may release rents.

The Treasury may by warrant remit, release, and discharge these rents and their arrears or any part of them (*b*).

(s) *River Thames.*

Rents for piers etc.

437. The Commissioners of Woods, acting with the consent of the Treasury and the Conservators of the River Thames, may make,

(*l*) See note (*k*), on p. 206, *ante*.

(*m*) Formerly to the Inclosure Commissioners. The duties of the Inclosure Commissioners were transferred to the Board of Agriculture (now the Board of Agriculture and Fisheries). See Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), and Board of Agriculture and Fisheries Act, 1903 (3 Edw. 7, c. 31).

(*n*) Crown Lands Act, 1852 (15 & 16 Vict. c. 62), s. 4. The award is made under seal and is final. The enrolment of the award is conclusive evidence that the provisions of the Crown Lands Act, 1852 (15 & 16 Vict. c. 62), have been complied with. If in the opinion of the Board of Agriculture and Fisheries there is any doubt as to the extent, identity, or boundaries of the lands or hereditaments charged with such rent or payment, the Board may appoint an assistant commissioner or other officer acting under the Inclosure Commissioners Act, 1851 (14 & 15 Vict. c. 53), or under the commissioners appointed by that Act, for the purpose of inquiring into and ascertaining such extent, identity, or boundaries, in all respects as such commissioners are by s. 8 of the Inclosure Act, 1846 (9 & 10 Vict. c. 70), authorised to appoint an assistant commissioner. The report of the assistant commissioner or other officer, if approved by the Inclosure Commissioners (see note (*m*), *supra*), may be embodied in their award and form part of it.

(*o*) Rents of assize are the certain established rents of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied. Those of the freeholders are frequently called chief rents, *redditus capitales;* and both sorts are indifferently denominated quit-rents, *quieti redditus*, because thereby the tenant goes quit and free of all other services (2 Bl. Com., 14th ed., p. 42).

(*p*) These were, perhaps, rents charged upon certain Crown lands in the county, the produce of which originally made up a large part of the "ferm," for which the sheriff was obliged to account at the Exchequer. Madox, Exchequer, 1711 ed., p. 651, says that this part of the sheriff's ferm was said to arise from the *corpus comitatus*, which "consisted of several assessed lands or rents, which when put together made the total sum that was called by the name." They came to be of small importance, as, whenever the King made a grant of the lands so charged, a corresponding deduction was made from the sheriff's ferm (*ibid.*, pp. 651—653).

(*a*) Crown Lands Act, 1852 (15 & 16 Vict. c. 62), s. 12. The Commissioners of Woods have the same powers and authorities for collecting and enforcing payment of such rents or payments as are vested in them for collecting and enforcing payment of other parts of the land revenues of the Crown by Acts in force on the 29th August, 1833 (the date of the passing of the Act), concerning the same.

(*b*) *Ibid.*, s. 13. The recital to this section explains the origin of this enactment, to the effect that many of these rents are very ancient and have become obsolete, and it is not known from what hereditaments and premises the same are payable, so that payment cannot be enforced.

SECT. 2.

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and when made revoke and vary, agreements respecting the annual payments to be made by the Conservators to the Commissioners (*c*) in respect of piers or landing-places on portions of the bed or shores of the river Thames erected or acquired by the Conservators under their arrangement (*d*).

(t) *Telegraphs and Telephones.*

Restrictions as to Crown property.

438. A company (*e*) under the Telegraph Acts may not place any work by the side of land or buildings so as to stop, hinder, or interfere with ingress or egress for any purpose to or from the same, or under, in, upon, over, along, or across land or buildings, except with the previous consent of the owner, lessee, and occupier of such land or buildings, which consent, in case of land or buildings belonging to or enjoyed by the Crown in right of the Crown, may be given by the Commissioners of Woods on behalf of the Crown (*f*).

(u) *Town Gardens Protection Act*, 1863.

Not to extend to Crown property.

439. The Town Gardens Protection Act, 1863 (*g*), does not extend to or include any garden, ornamental ground, or other land belonging to the Crown in right of the Crown or of the Duchy of Lancaster or any garden, ornamental ground, or other land for the time being under the management of the Commissioners of Works (*h*), or any garden, ornamental or other ground, for the due care and protection of which special provision is made by any public or private Act of Parliament (*i*).

(v) *Water Rights.*

Power to release or waive water rights.

440. The Commissioners of Woods may, with the consent of the Treasury, release to or waive in favour of a grantee of land

(*c*) Or which before the 15th August, 1879, the date of the passing of the Commissioners of Woods (Thames Piers) Act, 1879 (42 & 43 Vict. c. 73), should have been so made.

(*d*) Commissioners of Woods (Thames Piers) Act, 1879 (42 & 43 Vict. c. 73), s. 2; all sums paid to the Commissioners under such agreements are to be applied (in the same manner as sums received by the Commissioners from the Conservators under the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.)) as part of the hereditary possessions and land revenues of the Crown. Ss. 103, 104, of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.) (which relate to the account of rents, revenues, and proceeds, and to the payment of one-third of those rents and proceeds to the Commissioners), do not apply to rents, revenues, or proceeds received by the Conservators in respect of piers or landing-places, the annual payments in respect of which are the subject of agreement under the Commissioners of Woods (Thames Piers) Act, 1879 (42 & 43 Vict. c. 73) (*ibid.*, s. 3). The latter Act does not authorise the Conservators to erect, acquire, or retain piers or landing-places which they were not authorised to erect, acquire, or retain before the passing of that Act (*ibid.*, s. 4). As to the river Thames generally, see title WATERS AND WATERCOURSES.

(*e*) The term "company," in addition to the meaning assigned to it in this Act, means the Postmaster-General (Telegraph Act, 1868 (31 & 32 Vict. c. 110), s. 2).

(*f*) Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 21. As to the provisions of the Telegraph Acts and telegraphs and telephones generally, see title TELEGRAPHS AND TELEPHONES.

(*g*) 26 & 27 Vict. c. 13.

(*h*) See pp. 133, 198, *ante*.

(*i*) 26 & 27 Vict. c. 13, s. 7.

from the Commissioners or a parish council, district council, council of a county borough, or other local authority or body having power by statute to supply water, water rights exercisable by or reserved to the Crown (*k*).

(w) *Workmen's Compensation Act*, 1906.

Application to Crown.

441. The Workmen's Compensation Act, 1906 (*l*), does not apply to persons in the naval or military service of the Crown, but otherwise applies to workmen employed by or under the Crown to whom this Act would apply if the employer were a private person.

In the case of a person employed in the private service of the Crown, the head of that department of the royal household in which he was employed at the time of the accident is deemed to be his employer (*m*).

SECT. 3.—*Surrendered Revenues arising from Prerogative Rights.*

SUB-SECT. 1.—*Bona Vacantia generally.*

Definition.

442. The term *bona vacantia* is applied to chattels and goods in which no one can claim a property, and includes the personal estate of persons dying intestate and without next of kin, wreck, treasure trove, waifs, and estrays (*n*), but not goods lost or designedly abandoned, the property in which is vested in the first finder and is good against all, except the true owner in the case of goods lost (*o*).

The property in *bona vacantia* is vested in the Crown to prevent the strife and contention to which title by occupancy might otherwise give rise (*p*).

SUB-SECT. 2.—*Personal Estate on Intestacy and Failure of Beneficiaries.*

Intestates' unclaimed personalty.

443. On an intestacy (*q*), and where there are no next of kin, the Crown is entitled to the personal estate of the deceased as *bona vacantia* (*a*), subject to the widow's right to a moiety (*b*). This

(*k*) Crown Lands Act, 1894 (57 & 58 Vict. c. 43), s. 8.

(*l*) 6 Edw. 7, c. 58.

(*m*) *Ibid.*, s. 9. See also the Workmen's Compensation Rules, 1907, r. 79; and Robertson, Civil Proceedings by and against the Crown, p. 135.

As to workmen's compensation generally, see title MASTER AND SERVANT.

(*n*) These are classed as *bona vacantia* by Blackstone, who also includes royal fish (1 Bl. Com., 14th ed., 298).

(*o*) *Ibid.*, and see *Armory* v. *Delamirie* (1721), 1 Stra. 505; 1 Smith, L. C., 11th ed., 356; *Merry* v. *Green* (1841), 7 M. & W. 623; *Bridges* v. *Hawkesworth* (1851), 21 L. J. (Q. B.) 75.

(*p*) 1 Bl. Com., 14th ed., 298; and see *Dyke* v. *Walford* (1846), 5 Moo. P. C. C. 434. *Bona vacantia* originally belonged to the first occupant (see Bl. Com., *supra*; 3 Co. Inst. 132, 133; 2 Co. Inst. 166).

(*q*) As to rights relating to personal estate on an intestacy generally, see titles DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; PERSONAL PROPERTY.

(*a*) *Taylor* v. *Haygarth* (1844), 14 Sim. 8; and see *Barclay* v. *Russell* (1797), 3 Ves. 424, 430; *Cradock* v. *Owen* (1854), 2 Sm. & G. 241; *Read* v. *Stedman* (1859), 26 Beav. 495; *Dyke* v. *Walford* (1846), 5 Moo. P. C. C. 434. As to the Crown's right of administration, see *Re Gosman* (1880), 15 Ch. D. 67, 71, and title EXECUTORS AND ADMINISTRATORS.

(*b*) *Care* v. *Roberts* (1836), 8 Sim. 214, 216; and subject also to the widow's right up to £500 under the Intestates Estates Act, 1890 (53 & 54 Vict. c. 29); see title DESCENT AND DISTRIBUTION.

SECT. 3. Surrendered Revenues arising from Prerogative Rights.

right extends to the movables in England of a foreigner dying intestate and without next of kin (*c*), and to personalty vested in executors as trustees where there are no next of kin (*d*), but not to undisposed-of residue vested in executors, which belongs to the latter beneficially, unless the will shows a contrary intention (*e*).

Failure of trusts.

The Crown is also entitled to personalty as *bona vacantia* where it is vested in trustees for beneficiaries, all of whom are dead (*f*), and, perhaps, to chattels held in trust for a corporation aggregate after it has been dissolved (*g*).

SUB-SECT. 3.—*Wreck.*

Flotsam, jetsam, lagan, ligan, and derelict.

444. At common law by virtue of the prerogative (*h*), and by statute (*i*), the Crown is entitled to all unclaimed wrecks, including flotsam, jetsam, lagan or ligan (*k*), and derelict found in or on the shores of the sea or any tidal water in any part of the dominions of the Crown, except in places where the right has been granted to any other person (*a*). Flotsam, jetsam, and lagan, if taken on the high

(*c*) *Re Barnett's Trusts*, [1902] 1 Ch. 847. The maxim *Mobilia sequuntur personam* does not apply in such cases (*ibid.*).

(*d*) *Powell* v. *Merrett* (1853), 1 Sm. & G. 381, following *Middleton* v. *Spicer* (1783), 1 Bro. C. C. 201. The Crown is entitled to proceeds of sale of land vested in executors as trustees for the purposes of the Settled Land Acts on the death of a sole beneficiary without heirs or next of kin (*Re Bond, Panes* v. *A.-G.*, [1901] 1 Ch. 15).

(*e*) See, *e.g.*, *A.-G.* v. *Jefferys*, [1908] A. C. 411, H. L. As to when a contrary intention will be inferred, see *ibid.* As to the limitation of actions by or against the Crown in respect of intestate estates, see the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 3; and see, generally, titles DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

(*f*) *Cunnack* v. *Edwards*, [1896] 2 Ch. 679, C. A.

(*g*) See *Re Higginson and Dean, Ex parte A.-G.*, [1899] 1 Q. B. 325, *per* WRIGHT, J., at p. 329, where the Crown was held to be entitled to a final dividend in a bankruptcy becoming due to a limited company after it had been wound up and dissolved by order of the court. See also title CORPORATIONS. The funds of a friendly society which has come to an end, and to which there are no persons beneficially entitled, belong to the Crown as *bona vacantia* (*Braithwaite* v. *A.-G.* (1909), 25 T. L. R. 333).

(*h*) Under the early common law the Crown was entitled to all wrecks which came to shore (see the statute Prerogativa Regis, c. 13 (*incert. temp.*; 17 Edw. 2, stat. 1, c. 11, Ruff.; Hale, De Jure Maris, c. 7, Hargrave, Law Tracts, 38, 40; *Palmer* v. *Rowse* (1858), 3 H. & N. 505, 510), though this right was subsequently restricted to goods remaining unclaimed by the true owner within a year and a day by the Statute of Westminster I., 1275 (3 Edw. 1, c. 4); see also, as to the old law, *Hamilton* v. *Davis* (1771), 5 Burr. 2732, at p. 2738; *Eyston* v. *Studd* (1573), 2 Plowd. 459. Flotsam, jetsam, and lagan belonged to the Crown if the ship perished or the true owner did not appear to claim them, but only if found in the narrow seas adjoining the coast (see *Constable's* (*Sir Henry*) *Case* (1601), 5 Co. Rep. 106 a, 107 b; 1 Bl. Com., 14th ed., 292; 2 Co. Inst. 167; *Anon.* (1704), 6 Mod. Rep. 149).

(*i*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 510, 523.

(*k*) As to what constitutes wreck generally, see title SHIPPING AND NAVIGATION. Flotsam is where a ship is wrecked and the goods float on the sea, jetsam where they are cast into the sea in order to lighten a ship and sink, and lagan where they are cast into the sea attached to a buoy to mark the spot; in all cases it is necessary that the ship should perish (see *Constable's* (*Sir Henry*) *Case*, *supra*; *The Gas Float Whitton No.* 2, [1896] P. 42, at p. 51, C. A.).

(*a*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 510, 523. As to grants of wreck, see p. 212, *post*.

seas, belong, it seems, to the first finder where the true owner cannot be known (*b*), subject to the statutory provisions relating to derelict, fishing boats, nets, and other gear found at sea (*c*).

Receiver of wrecks.

445. Where any person finds or takes possession of any wreck within the United Kingdom, he must, if he is the owner, give notice, or if he is not the owner deliver the same, to the receiver of wreck for the district appointed by the Board of Trade (*d*), in the manner required, subject to certain penalties if he fails to do so (*e*).

Notices and powers.

A notice descriptive of the wreck must be posted by the receiver in the required manner (*f*), and owners may establish their claims within one year from the time when the same came into the hands of the receiver, and upon payment of the salvage, fees, and expenses due are entitled to have the wreck or proceeds (*g*). The receiver is empowered to sell the wreck immediately in certain cases when it is of small value or of a perishable nature (*h*).

Delivery to claimant.

446. Where no owner establishes a claim within the time prescribed, and the wreck is claimed by any admiral, vice-admiral, lord of a manor, heritable proprietor, or other person who has delivered a statement to the receiver as above, and has proved to the satisfaction of the latter his title to receive unclaimed wreck found

(*b*) This was the rule at common law, which, *semble*, is still applicable (see Hale, De Jure Maris, c. 7, Hargrave, Law Tracts, p. 41).

(*c*) As to derelict, salvage etc., see title SHIPPING AND NAVIGATION. As to fishing boats, nets etc., see the Sea Fisheries Acts, 1868 (31 & 32 Vict. c. 45), s. 21, and 1883 (46 & 47 Vict. c. 22), ss. 10, 30 (2)), and, generally, title SHIPPING AND NAVIGATION.

(*d*) Appointed under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 566. See, generally, title SHIPPING AND NAVIGATION.

(*e*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 518. In the case of an owner notice must be given to the receiver of the district stating that he has found or taken possession of the wreck, and describing the marks by which it can be recognised. The penalty for non-compliance is a fine not exceeding £100 for each offence, and in addition, if he is not the owner, forfeiture of any claim to salvage and liability to pay to the owner, if the wreck be claimed, or to the person entitled if it be unclaimed, double the value of the wreck, to be recovered in like manner as a fine under the Act.

(*f*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 520. Namely, within forty-eight hours of taking possession he must cause a description of the wreck and the distinguishing marks to be posted in the custom-house nearest to the place where the wreck was found or seized by him, and if the value, in his opinion, exceeds £20, he must transmit a similar description to the secretary of Lloyd's in London, who must post it in some conspicuous place for inspection (*ibid.*).

(*g*) *Ibid.*, ss. 521. 524, 525. As to disputed titles to unclaimed wreck, see *ibid.*, s. 526. As to the effect of delivery of wreck or payment of proceeds of sale by the receiver, see *ibid.*, s. 527. As to the power of the Board of Trade to purchase wreck, see *ibid.*, s. 528. And see, generally, title SHIPPING AND NAVIGATION. As to Admiralty jurisdiction relating to wreck, see *ibid.*, s. 529, and title ADMIRALTY, Vol. I., at p. 76.

(*h*) *Ibid.*, s. 522, namely, if it is under £5 in value, or so much damaged or of so perishable a nature that it cannot be kept with advantage, or if it is not of sufficient value to pay for warehousing (*ibid.*). As to detention of wreck in respect of salvage, see *ibid.*, ss. 546, 552, and *The Fulham*, [1899] P. 251, C. A.

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at the place where the wreck was found, the person so claiming, after payment of all expenses, costs, fees, and salvage due, is entitled to have the wreck delivered to him (*i*).

Sale of unclaimed wreck.

447. Where no owner establishes a claim to wreck found in the United Kingdom within the time specified above, and where the wreck is not claimed by any person entitled to unclaimed wreck, it must be sold by the receiver (*k*) ; and the proceeds of sale, after deducting the expenses of sale and other expenses incurred by him and his fees and the amount of salvage (*l*) determined by the Board of Trade in each case or by any general rule, are to be paid into the Exchequer (*m*), except where wreck is claimed in right of the Duchies of Lancaster or Cornwall, when they are to be paid to the Receivers-General of the respective Duchies or their deputies (*n*).

Franchise of wreck.

448. Wreck, flotsam, jetsam, and lagan could be granted by the Crown in the form of a franchise, and may be claimed by prescription (*o*). But under a grant of wreck simply, flotsam, jetsam, and lagan do not pass (*p*) ; and if the King's goods are wrecked, he can claim them at any time from the owner of the franchise (*q*).

The Crown, or any person claiming under it, is entitled to pass over any person's ground to obtain wreck (*r*).

SUB-SECT 4.—*Treasure Trove.*

Treasure trove.

449. Treasure trove is where any gold or silver in coin, plate, or bullion is found hidden in the earth or in any other secret place (*s*), and belongs to the Crown by prerogative right, unless the

(*i*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 525 (1).

(*k*) *Ibid.*, s. 525 (2).

(*l*) As to fees of receivers, see *ibid.*, ss. 567, 568 ; as to duties on wreck, *ibid.*, s. 569. As to salvage, see title SHIPPING AND NAVIGATION.

(*m*) *Ibid.*, s. 525 (2) (c); Merchant Shipping (Mercantile Marine Fund) Act, 1898 (61 & 62 Vict. c. 44), s. 1. Proceeds of unclaimed wreck were formerly payable to the mercantile marine fund ; but by the latter Act all sums accounted for and paid to the mercantile marine fund (except certain light dues etc.) are to be paid into the Exchequer, and the expenses formerly payable out of that fund, so far as they are not paid by any private person (except certain expenses relating to lighthouses etc., which are to be paid out of the general lighthouse fund), are to be paid out of moneys provided by Parliament. S. 525 (2) (c), *supra*, only applies during the life of the late Queen Victoria, but presumably the proceeds of wreck are still paid as directed therein (see p. 111, *ante*, as to the preservation of powers relating to the hereditary revenues).

(*n*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 525 (a), (b).

(*o*) Hale, De Jure Maris, c. 7, Hargrave, Law Tracts, p. 42 ; *Constable's (Sir Henry) Case* (1601), 5 Co. Rep. 106 a, 107 b. Flotsam may, it seems, be claimed within high and low water mark, and the west country men prescribe to have wreck as far as they can see a Humber barrel (*ibid.*). Wreck above low-water mark may be appurtenant to the foreshores forming part of the adjoining manor (*ibid.*). A grantee of wreck could maintain an action for trespass even though an owner existed (*Dunwich Corporation* v. *Sterry* (1831), 1 B. & Ad. 831) ; but see now the provisions in the text above. A grant of the office of Admiral, with wreck and profits appertaining, does not pass wreck appurtenant to a manor in the King's possession (*Wiggon* v. *Branthwait* (1699), 1 Ld. Raym. 473).

(*p*) *Constable's (Sir Henry) Case*, *supra*.

(*q*) Hale, De Jure Maris, c. 7, Hargrave, Law Tracts, p. 40 ; 2 Co. Inst. 168.

(*r*) *Anon.* (1704), 6 Mod. Rep. 149.

(*s*) 3 Co. Inst. 132, 133. The definition given by Blackstone is " money or

person who hid it is known or afterwards discovered, when it belongs to the latter (*t*).

The Crown gains no title unless the treasure is actually hidden in the earth with the *animus revocandi*. Therefore where it is scattered in the sea or on the surface of the earth, or lost or abandoned, it belongs to the first finder (*a*); but where the circumstances under which the treasure is found raise a *primâ facie* presumption that it was hidden, it will belong to the Crown unless another can show a better title (*b*).

Treasure trove may be granted by the Crown in the form of a "franchise," but it must be expressly named, and does not pass under a grant of franchises generally (*c*).

Any person finding treasure trove must make it known to the coroner of the district, and concealment is punishable with fine and imprisonment (*d*).

SUB-SECT. 5.—*Waifs.*

Waifs.

450. Waifs are things stolen and thrown away by the thief in his flight, and these belong to the Crown by prerogative right, as a punishment, it is said, to the owner for not having pursued the thief and retaken the goods (*e*). But the goods do not belong to the Crown until they have been seized on its behalf, and the property remains in the original owner if he can retake them before they have been so seized (*f*); and even when they are in the hands of the Crown, the owner is entitled to restitution if he pursues the thief with due diligence, or if he afterwards brings him to justice and secures a conviction (*g*).

If the goods are hidden or left behind by the thief, they are not "waifs," and the property remains in the true owner (*h*); and the goods of a foreign merchant though stolen and thrown away in flight, are not waifs (*i*).

coin, gold, silver, plate, or bullion": (1 Bl. Com., 14th ed., 295), which might, it seems, extend to articles other than gold or silver, but the term appears to be invariably restricted to the latter. Bullion connotes precious metal (gold or silver); see 3 Co. Inst. 132, 133.

(*t*) 3 Co. Inst. 132; 1 Bl. Com., 14th ed., 295.

(*a*) Brac., lib. 3, De Corona, c. 3, f. 118; 3 Co. Inst. 132; 1 Bl. Com., 14th ed., 296.

(*b*) *A.-G.* v. *British Museum* (*Trustees*), [1903] 2 Ch. 598. It is not sufficient for a claimant against the Crown to suggest a plausible theory for the presence of the treasure other than that of hiding (*ibid.*, 609, 610). For proceedings and pleadings for the recovery of treasure trove, see Robertson, Civil Proceedings by and against the Crown, pp. 177, 471, 544.

(*c*) *Ibid.*, p. 613.

(*d*) 3 Co. Inst. 133; *R.* v. *Thomas* (1863), Le. & Ca. 313. An information for concealing treasure trove is good before inquisition found (*R.* v. *Toole* (1867), I. R. 2 C. L. 36), and an indictment is good without averring fraud (*R.* v. *Thomas*, *supra*). As to the duties of coroners with regard to treasure trove, see *A.-G.* v. *Moore*, [1893] 1 Ch. 676, and title CORONERS.

(*e*) *Foxley's Case* (1600), 5 Co. Rep. 109 a; 1 Hale, P. C. 541. If a felon in flight abandons his own goods, these, it appears, belong to the Crown, but not until it is established that he fled for the felony (Hawk. P. C. 451; *Foxley's Case*, *supra*, at p. 109 b).

(*f*) 1 Bl. Com., 14th ed., 297.

(*g*) *Ibid.* See also the statute 21 Hen. 8, c. 11; 1 Hale, P. C. 541.

(*h*) *Foxley's Case*, *supra*, at p. 109 a.

(*i*) Fitz. Abr. tit. Estray, 1. This is apparently an ancient rule for the

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Estrays.

451. Estrays are such valuable animals, being of a tame or reclaimable nature, as are found wandering in any manor or lordship, and of which no man knows the owner (*j*).

These belong to the King as general owner and lord paramount by way of recompense for the damage done, or, as is more generally the case at the present day, to the lord of the manor by grant or prescription (*k*).

Property in, how acquired.

452. The absolute property in them does not, however, vest in the King until they have been proclaimed in the church and two market towns next adjoining the place where they are found, and no man has claimed them within a year and a day (*l*); but after that period has elapsed they belong to the Crown or lord of the manor, even though the original owner be a minor or under any incapacity (*m*), and before that period the Crown or lord of the manor has the property against all but the rightful owner (*n*).

Preservation of estrays.

453. The King or his grantee is bound to feed and preserve the beasts from damage during the year and a day (*o*), and may milk or shear them (*p*), but a grantee is liable to an action if he uses them for purposes of labour (*q*).

The rightful owner, if he claims within the year and a day, must pay the reasonable costs of feeding, keeping, and proclaiming them (*r*).

King's beasts.

454. The King's beasts may not be taken as estrays, for that would presuppose that the King had granted the right to take his own beasts (*s*).

Damage feasant.

455. The prerogative right of the King to take estrays must be distinguished from the right of owners and occupiers of land to take animals by way of distress damage feasant (*t*).

encouragement of foreign merchants, who, being strangers, would not know our laws and language (see 1 Bl. Com., 14th ed., 297).

(*j*) 1 Bl. Com., 14th ed., 297. Wild animals, such as bears or wolves, cannot be estrays, nor animals which are considered in this respect to be of no value, such as a dog or cat (see *ibid.*, Fleta, lib. 1, c. 43). Swans may be (*Case of Swans* (1592), 7 Co. Rep. 15 b, 17 a), though not any other fowl (1 Bl. Com., *supra*).

(*k*) 1 Bl. Com., 14th ed., 297.

(*l*) Bro. Abr. tit. Estray, 3, 4, 5, 10; *Brownlow* v. *Lambert* (1599), Cro. Eliz. 716.

(*m*) Bro. Abr., *supra*; *Constable's* (*Sir Henry*) *Case* (1601), 5 Co. Rep. 106 a, 108 b.

(*n*) Bac. Abr. tit. Prerogative, B, 9. As to the right of the Crown or lord when the beast strays into another manor, see Com. Dig. tit. Waife, F; Bro. Abr., *supra*; 12 Co. Rep. 101.

(*o*) 1 Roll. Abr. 879.

(*p*) Com. Dig. tit. Waife, F; *Bagshaw* v. *Goward* (1605), Cro. Jac. 147; *Anon.*, 12 Co. Rep. 101.

(*q*) *Ibid.*

(*r*) 1 Roll. Abr. 879; *Nicholson* v. *Chapman* (1793), 2 Hy. Bl. 254; *Anon.*, 12 Co. Rep. 101; 1 Bl. Com., 14th ed., 297.

(*s*) Bac. Abr. tit. Prerogative, B, 9.

(*t*) As to this right, see title ANIMALS, Vol. I., at p. 378.

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Right of fishing.

456. The Crown may, by immemorial usage, have an exclusive right of fishing in a creek or arm of the sea, or in any part of a navigable river (*a*), and the right may be claimed by a subject by prescription, which presupposes a prior grant by the Crown (*b*). The Crown may have such a several fishery in spite of the *primâ facie* right of the public to fish in the sea and in all creeks and navigable rivers, and to take fish on the foreshore between high and low water mark, on the supposition that the inhabitants of a particular district might relinquish the right in return for others equally or more beneficial (*c*) ; and where such an exclusive right exists, it may form the subject of a valid grant by the Crown (*d*).

Royal fish.

457. But though the Crown has the sovereign dominion and jurisdiction over the sea which encompasses the British Islands, and over all creeks and arms of the sea and navigable rivers (*e*), it has no general property in the fish therein, except whales and sturgeon. These are royal fish and belong to the Crown (*f*) (except in such places as are privileged by grant or otherwise), if taken in the seas forming parcel of the dominions of the Crown, for, if taken in the wide seas, they belong to the taker (*g*).

The rights to royal fish may also be claimed as a franchise by

(*a*) Hale, De Jure Maris, Hargrave, Law Tracts, pp. 11, 20 ; and see *Vivian* v. *Blake* (1809), 11 East, 263 ; *Orford Corporation* v. *Richardson* (1791), 4 Term Rep. 437. The claim must, it is said, extend to a date prior to Magna Carta (see Vol. VI., p. 484, and note (*d*), *infra*). Mussel beds or scalps on the foreshore or estuary of a navigable river in Scotland belong to the Crown, and may be granted or leased to a subject (*Parker* v. *Lord Advocate*, [1904] A. C. 364).

(*b*) *Orford Corporation* v. *Richardson*, *supra* ; Hale, De Jure Maris, Hargrave, Law Tracts, pp. 17, 18, 20; and see *Bagott* v. *Orr* (1801), 2 Bos. & P. 472; *Rogers* v. *Allen* (1808), 1 Camp. 309. The right of fishing in the sea cannot be annexed to land (*Ward* v. *Creswell* (1741), Willes, 265), but an exclusive right of fishing in a navigable river may be appurtenant to a manor (*Rogers* v. *Allen*, *supra*).

(*c*) Hale, De Jure Maris, *supra*. As to the *primâ facie* right of the public to fish in the sea and navigable rivers, see the cases cited in notes (*a*) and (*b*), *supra*, and *Carter* v. *Murcot* (1768), 4 Burr. 2163. As to the right of the public to take fish on the foreshore, see *Bagott* v. *Orr*, *supra* ; *Warren* v. *Mathews* (1703), 6 Mod. Rep. 73. As to public rights of fishing generally, see titles FISHERIES ; WATERS AND WATERCOURSES.

(*d*) See *Parker* v. *Lord Advocate*, *supra*. The Crown was restrained by Magna Carta from making fresh grants affecting public privileges, but where the Crown had excluded the public before Magna Carta, such exclusive rights as it acquired might afterwards be lawfully granted out (*Malcomson* v. *O'Dea* (1863), 10 H. L. Cas. 593). Such a right, if granted before Magna Carta, and reverting to the Crown, does not merge in the prerogative, but may be regranted by the Crown (*Northumberland* (*Duke*) v. *Houghton* (1870), L. R. 5 Exch. 127).

(*e*) See Hale, De Jure Maris, c. 4, Hargrave, Law Tracts, p. 10; Bac. Abr. tit. Prerogative, B, 3; *Constable's* (*Sir Henry*) *Case* (1601), 5 Co. Rep. 106 a; *Case of the Isle of Ely* (1609), 10 Co. Rep. 141 a.

(*f*) Statute Prerogativa Regis, c. 11 (*incert. temp.* ; 17 Edw. 2, stat. 1, Ruff.); and see *Case of Swans* (1592), 7 Co. Rep. 15 b, 16 a. According to Hale, the right extends to "sturgeon and grampuses, or great fishes" (see Hale, De Jure Maris, Hargrave, Law Tracts, p. 43). As to the right of the Queen consort to the tail portion, and of the finder to the body, see *ibid.*, Vol. VI., p. 366.

(*g*) Bac. Abr. tit. Prerogative, B, 5.

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a subject either by grant or prescription, and either in gross or as appurtenant to an honour, manor, or hundred (*h*).

SUB-SECT. 8.—*Royal Swans.*

Property in swans.

458. The property in all white swans swimming in open and common rivers, provided they are wild and unmarked, belongs to the Crown by prerogative right (*i*).

The property in swans in a certain river may, however, be claimed by a subject by grant or prescription (*k*), or when they are tame (*l*), or by the grant of a swan-mark from the Crown; if so marked they belong to the owner of the mark wherever they may fly (*m*).

SUB-SECT. 9.—*The Revenues of the County Palatine of Durham.*

The County Palatine of Durham.

459. The *jura regalia*, or prerogative rights of the Crown, relating to property within the County Palatine of Durham, which were formerly attached to the bishopric of Durham as incident to the royalty or franchise of the county palatine (*n*), were separated from the latter and revested in the Crown as from the 21st June, 1836 (*o*), and as from the 23rd July, 1858, all forfeitures of lands or goods for treason or otherwise, and all mines of gold and silver, treasure trove, escheats, fines and amerciaments, and all *jura regalia*, of whatever nature or kind (other than any estate and interest in the beds and shores of navigable rivers so far as the tide flows, and in the shore of the sea, and any inclosures, embankments, and encroachments therefrom or thereupon respectively (*p*)), vested in the Sovereign in right of the County Palatine of Durham (*q*), have become revested in the Sovereign in right of the Crown, and are to be exercisable and recoverable, and the proceeds therefrom applied accordingly (*r*).

Rights of Bishop of Durham.

460. This transfer does not, however, include or affect the rights and powers of the Bishop of Durham with regard to any lordships, manors, houses, lands, tenements, tithes, rents, collieries, mines, minerals, rectories, advowsons, profits, or emoluments of

(*h*) Hale, De Jure Maris, Hargrave, Law Tracts, p. 43.

(*i*) *Case of Swans* (1592), 7 Co. Rep. 15 b, 16 a. And see title ANIMALS, Vol. I., at p. 366, note (*t*).

(*k*) *Case of Swans*, *supra*, at p. 18 b.

(*l*) *Ibid.*, at p. 17 b.

(*m*) *Ibid.*, at p. 17 a. The statute 22 Edw. 4, c. 6, required a property qualification for the owner of a swan-mark, but this was repealed by the Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 1.

(*n*) Durham was a county palatine by prescription or immemorial custom at least as old as the Conquest (1 Bl. Com., 14th ed., 116). As to the transfer of palatine jurisdiction to the Crown, see note (*d*), p. 217, *post*.

(*o*) Durham (County Palatine) Act, 1836 (6 & 7 Will. 4, c. 19), s. 1. The rights then transferred were vested in the Crown as a franchise separate from the Crown, but are now held *jure coronæ* under the Durham County Palatine Act, 1858 (21 & 22 Vict. c. 45) (see the text, *infra*).

(*p*) Special provision is made as to the foreshore in Durham (see p. 114, *ante*).

(*q*) As to what is comprised in the term "county of Durham," see note (*f*), p. 114, *ante*.

(*r*) Durham County Palatine Act, 1858 (21 & 22 Vict. c. 45), s. 5. As to the surrender of the hereditary revenues and payment to the Exchequer, see p. 109, *ante*.

any kind or description whatsoever, whether held in right of the bishopric or of the county palatine, or otherwise, so as to sever or separate the same from the bishopric, but is only to apply to the profits and emoluments expressly mentioned above (*s*).

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461. The transfer is also not to affect the right of any person holding a patent of any office to receive any fee or stipend granted by such patent out of the revenues of the bishopric of Durham, which continue to be subject to all the same fees and stipends in respect of any office in the county of Durham as they were subject to before the 21st June, 1836 (*t*).

Palatinate officers.

SECT. 4.—*Revenues of a Hereditary Nature retained by the Crown.*

SUB-SECT. 1.—*The Revenues of the Duchy and County Palatine of Lancaster.*

(1) *The Title to the Duchy.*

462. The County Palatine of Lancaster was conferred by Edward III. in the year 1342 upon Henry Plantagenet, Earl of Lancaster (*a*), who by a subsequent charter of 1351 was created Duke of Lancaster and invested with the full *jura regalia* of a county palatine (*b*). By this charter the Duchy and the offices of Chancellor and Attorney-General were created (*c*).

The County Palatine of Lancaster.

After various subsequent charters and devolutions of title (*d*),

(*s*) Durham (County Palatine) Act, 1836 (6 & 7 Will. 4, c. 19), s. 9.

(*t*) *Ibid.*, s. 6. By s. 3 power is conferred upon the Crown of appointing a *custos rotulorum* of the county of Durham, and of filling every future vacancy in that office. As to the Attorney-General and Solicitor-General of the County Palatine of Durham, see p. 76, *ante*.

(*a*) *A.-G. of the Duchy of Lancaster* v. *Devonshire* (*Duke*) (1884), 14 Q. B. D. 195, 197, where the early history of the Duchy is discussed. For the charter itself, see Hardy's Charters of the Duchy of Lancaster, p. 1.

(*b*) Hardy's Charters of the Duchy of Lancaster, p. 102. The charter grants the *jura regalia* as freely and fully as the Earl of Chester had them in the County Palatine of Chester (as to Chester, see Vol. VI., p. 401, note (*h*)). Under this grant the right to *bona vacantia* has been held to pass (*Dyke* v. *Walford* (1846), 5 Moo. P. C. C. 434).

(*c*) Hardy's Charters of the Duchy of Lancaster, p. 9; *A.-G. of the Duchy of Lancaster* v. *Devonshire* (*Duke*), *supra*, at pp. 197, 204, 205. As to the Attorney-General, see p. 76, *ante*.

(*d*) By charters of 1361, 1362, and 1377, the Duchy and county palatine were conferred upon John of Gaunt, fourth son of Edward III. (Hardy's Charters of the Duchy of Lancaster, pp. 12, 17, 33), and from him it descended to his son, Henry IV., who on his accession in 1399, by charter having the authority of Parliament, settled it upon himself and his heirs separate from the Crown of England (Hardy's Charters of the Duchy of Lancaster, p. 102; *A.-G. of the Duchy of Lancaster* v. *Devonshire* (*Duke*), *supra*, at p. 197; 4 Co. Inst. 205; the reason of this is said to have been the doubtful title of Henry IV. to the throne (*ibid.*)), and directed the same *jura regalia* to be exercised as formerly and the ancient officers to be continued (Hardy's Charters of the Duchy of Lancaster, p. 138). In 1461 Edward IV. caused fresh charters to be made declaring Henry VI. attainted and his possessions forfeited, and assuring the Duchy to himself and his heirs, kings of England, it being also provided that the county of Lancaster should be a county palatine and form parcel of the Duchy, and that there should be a seal of the Duchy and of the county palatine, and a chancellor, officers, and councillors of the Duchy, and a chancellor, judge, and officers of the county

SECT. 4. Revenues of Hereditary Nature retained by the Crown.

the Duchy, of which the county palatine formed parcel (*e*), became vested in Henry VII., who, by charter having the authority of Parliament (*f*), resettled it upon himself and his heirs as separate from the Crown of England, with the same officers and the same seals, and in as large and ample a manner as Henry IV., Henry V., and Henry VI. had it (*g*).

Vested in the Sovereign.

In virtue of this charter the Duchy has been held to be vested in the Sovereign in his body natural, and not in his body politic in right of the Crown (*h*), though this appears to have been doubted (*i*). The revenues of the Duchy are retained by the Crown for its personal use (*k*), except those derived from certain liberties of the Duchy outside the county palatine (*l*).

Prerogative rights.

463. The royal prerogatives extend, in general, to the Duchy lands as they do to lands held in right of the Crown. Thus, the non-recital of a prior grant for life invalidates a subsequent grant of Duchy lands (*m*); and three usurpations of an advowson in the Duchy will not put the Crown out of its right (*n*); nor are grants of Duchy lands void by reason of the nonage of the King (*o*).

(2) *Distinction between the Duchy and the County Palatine.*

Extent of the Duchy.

464. Though the county palatine is incorporated with the Duchy by charter (*p*), the latter is for some purposes distinct from the former, and includes much territory lying outside the county palatine, and in particular a district surrounded by the city of Westminster in which the Court of the Duchy Chamber is situated (*q*).

palatine (Hardy's Charters of the Duchy of Lancaster, pp. 279, 281—284; 4 Co. Inst. 206; *A.-G. of the Duchy of Lancaster* v. *Devonshire* (*Duke*) (1884), 14 Q. B. D. 195, 197). By these charters the Duchy and county palatine were reunited in possession with the Crown, and the *jura regalia* were only prevented from merging by their special provisions.

(*e*) See note (*d*) on p. 217, *ante*.

(*f*) A charter made with the authority of Parliament is equivalent to an Act of Parliament (see *The Prince's Case* (1606), 8 Co. Rep. 1 a, 28 a, b).

(*g*) Hardy's Charters of the Duchy of Lancaster, pp 341, 346; 4 Co. Inst. 206; *Case of the Duchy of Lancaster* (1561), Plowd. 212, 220.

(*h*) *Case of the Duchy of Lancester* (1561), Plowd. 212, 222, decided with reference to Henry VII.

(*i*) *Ibid.*, at p. 221. But see *Alcock* v. *Cooke* (1829), 5 Bing. 340, 352, 354, where the right of the Crown to the Duchy as private estate seems to have been taken for granted.

(*k*) See pp. 109, 110, *ante*. Apparently this is by reason of Henry VII.'s charter, but it has been argued that the Crown has the Duchy in right of the Crown (see the references in note (*d*), p. 217, *ante*). It will be noted that the Act of Settlement passes to the present royal line all honours, regalities, prerogatives, powers, and authorities belonging or appertaining to the Crown and regal government (see Vol. VI., p. 322), and therefore, if the decision in the *Case of the Duchy of Lancaster*, *supra*, is correct, the Sovereign would appear to be entitled in his body natural.

(*l*) See p. 219, *post*.

(*m*) *Alcock* v. *Cooke* (1829), 5 Bing. 340. As to non-recitals in royal grants, see Vol. VI., p. 482.

(*n*) *R.* v. *York* (*Archbishop*) (1591), Cro. Eliz. 240, 241.

(*o*) *Case of the Duchy of Lancaster*, *supra*.

(*p*) See the text *supra*.

(*q*) 3 Bl. Com., 14th ed., 78.

465. Seals of the Duchy and county palatine have been established by charter (*r*), the seal of the Duchy remaining with the Chancellor at Westminster, that of the county palatine being kept in a chest in the county palatine in charge of the keeper of the palatine seal (*s*).

Seals.

466. Modern grants under statutory authority are generally directed to be made under the seal or seals of the Duchy and county palatine (*t*); but ordinary property, or rights which are properly incidental to the Duchy, whether in the county palatine or outside but within the Duchy, will, it seems, pass under the Duchy seal; whilst things which are incidental only to the *jura regalia* of the county palatine must pass under the palatine seal (*a*).

Grants.

Grants under the Duchy seal constitute matter of record, and as such are taken cognisance of by the courts (*b*) and require no delivery (*c*).

Liberties of the Duchy.

467. The following rights in liberties of the Duchy of Lancaster situate outside the county of Lancaster have been expressly vested in the Sovereign in right of the Crown, and not in right of the Duchy (*d*): (1) Escheats or forfeitures of land situate in any such liberty, not being an escheat or forfeiture of land holden of any manor vested in the Sovereign in right of the Duchy; (2) any right vested in the Sovereign to the personal estate of any person domiciled within any such liberty and dying intestate and without next of kin; (3) any right vested in the Sovereign to any sum arising from a fine imposed on, or estreated recognisances acknowledged by, any person within any such liberty.

(3) *Management of the Duchy Lands and Revenues.*

Management.

468. The powers and authorities of the Chancellor and Council of the Duchy with regard to the Duchy lands and revenues have been specially preserved, and the Duchy lands continue to be granted and demised, and the rents and revenues to be received and applied, under the order and direction of the Chancellor and

(*r*) See the text, p. 218, *ante*.

(*s*) 4 Co. Inst. 210.

(*t*) Under the Duchy of Lancaster Lands Act, 1855 (18 & 19 Vict. c. 58), the Duchy seal only is mentioned (see p. 221, *post*). Under the old common law grants of Duchy lands were void unless passed under the Duchy seal, and grants of palatine lands were void unless passed under the palatine seal (see *A.-G. of the Duchy of Lancaster* v. *Devonshire* (*Duke*) (1884), 14 Q. B. D. 195, 205, where a charter of 4 Hen. 5 is cited; 4 Co. Inst. 210).

(*a*) *Cotton* v. *Johnson* (1690), 3 Salk. 110, 111. Thus, a corporation cannot be created under the Duchy seal, but may be under the palatine seal; and things naturally incidental to the tenure of lands, as advowsons, rents, ways, or offices, may pass under the Duchy seal, but not fairs or markets, which are incidents of palatine rights (*ibid.*).

(*b*) *Case of the Duchy of Lancaster* (1561), Plowd. 212, 218; 4 Co. Inst. 206, 209.

(*c*) 4 Co. Inst. 209. Formerly livery of seisin and attornment appear to have been necessary in the case of Duchy lands outside the county palatine, but not as to lands in the county palatine, by reason of the *jura regalia* (4 Co. Inst. 206).

(*d*) Revenue, Friendly Societies, and National Debt Act, 1882 (45 & 46 Vict. c. 72), s. 24.

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Council and other officers of the Duchy (*e*), as before the passing of the Crown Lands Act, 1829, which does not affect purchases, sales, or grants made under the seal or seals of the Duchy and county palatine (*f*).

When the office of Chancellor becomes vacant by death, resignation, or otherwise, the Vice-Chancellor, as well during the vacancy as after its determination, is to continue to discharge the duties of his office until a fresh appointment of Vice-Chancellor is made, subject to the powers of the succeeding Chancellor as to his office (*g*).

Acquired lands.

469. Lands may be annexed to the Duchy by letters patent under the Great Seal, which are to be as good and available as if done with authority of Parliament (*h*). The Chancellor and Council have the same powers with regard to such lands, whether lying within or without the county palatine, as they have with regard to lands of the Duchy lying within the county palatine (*i*); and grants, leases, and other dispositions of such lands are subject to the same ceremonies in all respects as grants of the ancient possessions of the Duchy (*j*). The rents and revenues of the lands so annexed to the Duchy and county palatine are to be paid to the Court of the Duchy Chamber at Westminster, or to the receiver-general or other ministers of the Court, according to the ancient custom (*k*).

Accounts.

470. Accounts of the receipts and disbursements of the Duchy are to be annually submitted by the proper officers of the Duchy to the Commissioners of the Treasury, in the form and with the explanations directed by the latter.

This annual account is to be presented by the Treasury to both

(*e*) The ancient officers of the Duchy are the "Chancellor, attorney, receiver-general, clerk of the court, auditors, surveyors, messenger, and four learned of the law assistants and of council with the court" (4 Co. Inst. 206). The officers usually appointed at the present day are the Chancellor (whose duties are performed by the Vice-Chancellor), Vice-Chancellor, and Attorney-General, who usually hold similar offices relating to the county palatine (see p. 217, *ante*), the receiver-general, auditor, clerk of the council and registrar, a solicitor, assistant solicitor, and professional legal assistant, the surveyor-general and deputy receiver-general, assistant surveyors, seal keeper, cursitor, and clerks.

(*f*) Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 130. By this Act the management of the Crown lands generally was handed over to the Commissioners of Woods, Forests, and Land Revenues (see p. 125, *ante*). Certain Acts relating to Crown lands were repealed by the Act except in so far as they affect lands within the ordering of the Duchy of Lancaster.

(*g*) Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23), s. 7.

(*h*) Statute 2 & 3 Phil. & Mar. c. 20, ss. 4, 5. But no lands may be so annexed under this Act which form part of the ancient inheritance of the Crown, the Principality of Wales, the Duchy of Cornwall, or the Earldom of Chester, or are within the counties of Chester and Flint; nor may lands be so annexed exceeding and amounting in the whole above the yearly value of £2,000 (*ibid.*, s. 8).

(*i*) *Ibid.*, ss. 6, 7.

(*j*) *Ibid.*, ss. 3, 9. Certain lands which had previously been severed from the Crown were re-annexed to the Duchy by the Act, and made subject to the same powers, provisions etc. as the ancient possessions of the Duchy (*ibid.*, ss. 1, 2, 3).

(*k*) *Ibid.*, s. 9. A general power of purchasing lands to be held with the possessions of the Duchy has been conferred upon the Chancellor and Council by a more recent statute (see p. 234, *post*).

Houses of Parliament within one calendar month after the first meeting of Parliament subsequent to the 1st of January (*l*). SECT. 4.

(4) *Sales, Exchanges, and Enfranchisements of Duchy Lands.*

Revenues of Hereditary Nature retained by the Crown.

471. The possessions of the Duchy were brought within the restrictions upon alienation imposed upon Crown lands generally by the Crown Lands Act, 1702 (*m*), by which all grants, assurances, and other dispositions of Crown lands were rendered void unless made in accordance with the provisions of the Act (*n*). The Chancellor and Council, however, have been expressly empowered to contract and agree with any person, or body politic, corporate, or collegiate, for the absolute sale of, and may absolutely sell and dispose of, any land belonging to the Crown in right of the Duchy, which they may deem not convenient to be held with the other possessions of the Duchy, and for such consideration as may appear sufficient (*o*). Sale of land.

Upon payment of the purchase-moneys the land is to be assured to the purchaser by the Chancellor and Council under the seal of the Duchy, in the name of His Majesty, his heirs or successors. The assurance may be in the form provided by statute or any other more convenient form, and, if enrolled in the Court of the Duchy Chamber of Lancaster within six calendar months of the date thereof, is valid and sufficient to pass all the rights and interests of the Crown to which it relates (*p*). Assurance.

472. The purchase-moneys for land so sold by the Chancellor and Council are to be paid to the receiver-general of the Duchy, or his sufficient deputy or deputies, who must give receipts therefor (*q*). Payment of purchase-money.

473. Subject and without prejudice to the rights of any lessee, tenant, or occupier, the Chancellor and Council may contract with any local sanitary authority for the sale of, and may absolutely sell and dispose of, the whole or any part of the Duchy lands, or any right, interest, or easement in, through, over, or on the same, which the local sanitary authority may deem it expedient to purchase for the purposes of the Public Health Act, 1875 (*a*). The consideration is to be such as appears to the Chancellor and Council sufficient, and on payment of the purchase-money in the prescribed manner (*b*), the property contracted for may be assured to the local sanitary authority by the Chancellor and Council in the name of the Sovereign under the Duchy seal (*c*). The purchase-moneys are to be applied as in the case of sales (*d*). Sale to local authority.

(*l*) 1 & 2 Vict. c. 101, s. 2.
(*m*) 1 Ann. c. 1, s. 5; stat. 1, c. 7, Ruff. See p. 147, *ante*.
(*n*) See p. 147, *ante*.
(*o*) Duchy of Lancaster Lands Act, 1855 (18 & 19 Vict. c. 58), s. 1.
(*p*) *Ibid.* For form of conveyance, see *ibid.*, Sched. X. For the general provisions as to enrolment, see p. 238, *post*.
(*q*) *Ibid.*, s. 2.
(*a*) See title PUBLIC HEALTH ETC.
(*b*) Namely, as required by s. 2 of the Duchy of Lancaster Lands Act, 1855 (18 & 19 Vict. c. 58); see *supra*.
(*c*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 178.
(*d*) See p. 228, *post*.

SECT. 4.

Revenues of Hereditary Nature retained by the Crown.

474. The Chancellor and Council may contract with the Secretary of State for War and absolutely sell and dispose of, for such consideration as appears sufficient, any of the Duchy lands or rights which the Secretary of State for War considers expedient for the purposes of the Defence Acts, 1842 and 1860. The lands or rights are to be assured, and the purchase-money paid and applied, as in the case of sales (*e*).

Sales to Secretary of State for War.

Sales to Postmaster-General.

475. Similar powers are conferred upon the Chancellor and Council of selling to the Postmaster-General such of the Duchy lands as the latter, with the consent of the Treasury, may deem it expedient to purchase for the purpose of the Post Office (*f*).

Grants to literary and scientific institutions.

476. Duchy lands, not exceeding in the whole one acre in any one parish, may, by deed and writing under the hand and seal of the Chancellor, attested by the clerk of the Council, be granted, conveyed, or enfranchised to, or in favour of, certain literary and scientific institutions, upon such terms and conditions as the Chancellor and Council may think fit (*g*). But where the land is granted by way of gift, and ceases to be used for the purposes of the institution, it is to revert to and become part of the possessions of the Duchy, except that where the institution is removed to another site, land not originally part of the Duchy possessions may be exchanged or sold for the benefit of the institution, and the money applied to the erection or establishment of the same upon the new site (*h*).

Redemption of land tax.

477. For the purpose of redeeming land tax charged upon the lands and revenues within the survey and receipt of the Duchy officers, the Chancellor and Council may sell and grant and assure under the Duchy seal to any person or body politic or corporate, so much of the lands, tenements, tithes, mines, minerals, collieries, woods, fens, marshes, waste lands, or other hereditaments within the survey and receipt of the Duchy, at the best price or consideration in money procurable, as will raise a sum sufficient for the redemption of the tax. The purchase-money is to be paid to the receiver-general of the Duchy, who is to give receipts for the same (*i*).

(*e*) Militia (Lands and Buildings) Act, 1873 (36 & 37 Vict. c. 68), s. 7. As to the mode of assurance, see p. 221, *ante;* as to application of purchase-money, see p. 228, *post*.

(*f*) Post Office (Land) Act, 1881 (44 & 45 Vict. c. 20), s. 3 (3); Post Office Act, 1908 (8 Edw. 7, c. 48), s. 46 (3). The assurance is to be made and the purchase-money paid and dealt with as in the case of sales under the Duchy of Lancaster Lands Act, 1855 (see as to assurance, p. 221, *ante;* as to purchase-money, p. 228, *post*). And see title POST OFFICE.

(*g*) Namely, those mentioned in the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. 112), s. 2. The consideration money (if any) is to be paid to the receiver-general of the Duchy and applied as under the statute 48 Geo. 3, c. 73 (see p. 228, *post*) The powers conferred upon owners and ratepayers of a parish under the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), may, as to dealing with parish property, spending money, or raising a rate, be exercised, in the case of a rural parish, by the parish meeting (Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 52 (1)). And see title LITERARY AND SCIENTIFIC SOCIETIES.

(*h*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 4.

(*i*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 139. Certificates

478. The Chancellor and Council are empowered to sell and grant and assure to any person or body politic or corporate, under the seal of the Duchy, such manors and lordships belonging to the Crown within the survey and receipt of the Duchy as consist of manorial rights without any lands, or with very small quantities of land, belonging to them, and where the greater part of the land over which the manorial rights extend is the property of individuals; also manors or lands of which the Crown in right of the Duchy is not the sole proprietor, but in which it is entitled to an undivided share jointly with individuals, or which are intermixed with the property of individuals or lie remote from other property of the Crown; also ground or buildings appertaining to, or anciently held with, any castle or strong building used as a common gaol, or with any building used for holding assizes or sessions in any county or district, or for the court-house or gaoler's house, or in which the magistrates may claim to have rights from length of use or enjoyment for the public purposes of the county or district; also tithes within the Duchy issuing out of lands belonging to individuals, and mills, fisheries, ferries, tolls, and stalls of markets and fairs; also wastes of the Crown within the Duchy from which usurpation or encroachments have been made (*k*).

Sale of manorial rights etc.

479. With a view to extinguishing Crown rights over the lands of individuals, the Chancellor and Council are empowered to contract and agree to sell and to sell and convey to the owner or proprietors of lands within the survey of the Duchy, for the best price procurable, any rights of forest, chase, or free warren belonging to the Crown in right of the Duchy, and upon such sale the lands are to be for ever freed and exonerated therefrom. The purchase-money for the rights is to be paid to the receiver-general of the Duchy (*l*).

Sale of forest rights.

480. Lands not exceeding five acres in any one grant within the survey of the Duchy may also be granted, for all the estate and interest of the Crown therein, for curtilages or for any other conveniences and accommodations of any churches or chapels where the liturgy and rites of the Church of England are used or observed. Any person, or body politic or corporate, is to have full capacity to take and hold such land, which may be granted by warrant under the hands of any three Treasury Commissioners specifying the

Land for churches and chapels.

of such sales are to be in the form specified in Sched. G to the Act. As to enrolment, see p. 238, *post*; as to application of the proceeds of sale, see p. 228, *post*. See also title LAND TAX.

(*k*) 48 Geo. 3, c. 73, s. 10.

(*l*) Statute 1 & 2 Geo. 4, c. 52, s. 12. The purchaser of such forestal or other rights is, in lieu and stead of such rights, at all times thereafter to have power to depute and appoint a gamekeeper or keepers to preserve and take and kill game over the lands to which the rights extended provided they are not situate within any existing manor. Such gamekeeper is to have the like powers, privileges, exemptions, and protections, and is to obtain the like certificate, and be liable to the same game duty, and is to register and enter his appointment in like manner, and be subject to the same rules as gamekeepers of any manors or royalties in England enjoy or are subject to by any usage or Act of Parliament. But not more than one gamekeeper may be appointed with power to take or kill game within the same tract or district (*ibid.*, s. 13).

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premises so to be vested. The warrant is directed to be enrolled (*m*) in the office of the auditor of land revenue for the division or county where the premises are situate, and also in the office of the Commissioners of Woods (*n*). Enrolment must be certified by the auditor or Commissioners at the foot and on the back of the warrant under their hands, and the warrant returned to the grantees named, who, as from the time of enrolment, are to be deemed in actual seisin and possession of the premises specified, and to hold the same peaceably and quietly, freed from all claims and demands by the Crown or any person claiming under the Crown and from all incumbrances whatsoever (*o*). Grants of Duchy lands for sites for churches, chapels, or the residences of ministers, or for outbuildings, offices, churchyards, or glebe for the same, may also be made under the Gifts for Churches Act, 1811 (*p*).

Sale of rents.

481. The Chancellor and Council are empowered to sell and grant and assure, in the name of the Crown under the Duchy seal, to the use of the purchasers and their heirs for ever, all fee-farm rents, rents-service, rents-seck, quit rents, chantry rents, guild rents, castle guard rents, dry and unimprovable and other rents within the survey of the Duchy (*q*) for such consideration in money as they may judge adequate, or be able to procure, not being less than—(1) for any rent amounting to 10*s*. per annum and upwards, not less than twenty-four years' purchase of the net amount of the rent after deducting the land tax chargeable thereon; (2) for any rent amounting to 5*s*. and under 10*s*. per annum, not less than twenty-two years' purchase of the gross amount of the rent; (3) for any rent amounting to 1*s*. and under 5*s*. per annum, not less than twenty years' purchase of the gross amount of the rent (*r*).

Enfranchisement of copyholds.

482. The Chancellor and Council may contract with any person holding any lands or hereditaments by copy of court roll, or of the nature of copyhold or customary tenure, or for which any fine is

(*m*) More general provisions are made for enrolment by a later Act, which, it seems, supersedes these provisions (see p. 238, *post*).

(*n*) In the Act, Surveyor-General of Land Revenue. This office has been abolished and the duties handed over to the Commissioners of Woods (see p. 122, *ante*).

(*o*) Statute 52 Geo. 3, c. 161, s. 27, repealed except as to the Duchy of Lancaster by the Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 1.

(*p*) 51 Geo. 3, c. 115, s. 1. For the provisions of the Act, see p. 192, *ante*.

(*q*) This is by the joint effect of the statutes 19 Geo. 3, c. 45, and 27 Geo. 3, c. 34, s. 2. These rents were vested in trustees for sale under the statutes 22 Car. 2, c. 6, and 22 & 23 Car. 2, c. 24; but the latter Acts were repealed by the statute 19 Geo. 3, c. 45, and the rents declared to be in the actual seisin of the King as if they had not been passed (see Public General Acts, 19 Geo. 3, Vol. II., p. 974). The sale of fee-farm and other rents vested in trustees for the Crown was expressly excepted from the restriction on sales of Crown lands imposed by the Crown Lands Act, 1702 (1 Ann. c. 1; stat. 1, c. 7, Ruff.), by s. 8 of that Act, and the latter Act was repealed altogether, so far as it is related to the above fee-farm rents remaining unsold, by the statute 19 Geo 3, c. 45. See also note (*f*), p. 147, *ante*.

(*r*) Statute 27 Geo. 3, c. 34, s. 2. As to the application of the proceeds of sale, see p. 228, *post*.

payable to the Crown on descent or alienation, and being within and parcel of any of the honours, manors, or lordships of the Duchy, for the enfranchisement of the same, and for discharging all present and future owners and tenants and their heirs from the payment of all customary fines, fines of ingress and other fines, heriots, reliefs, quit rents, and other dues and payments to which, by the respective customs of such honours, manors, or lordships, they would now or hereafter be subject or liable.

The consideration in money and the terms and conditions as to enfranchisement are to be such as may be agreed upon; and the lands and hereditaments are to be assured by the Chancellor and Council in the name of the Crown under the seal of the Duchy, to be holden as of the honour or manor of which they are parcel, in free and common socage, freed and discharged from all fines, heriots, reliefs, quit rents, and other customary dues and payments, suits, and services whatever.

The assurance must be in the form prescribed, or as nearly thereto as may be (*s*).

Saving for leases.

483. Such grants are to be valid and effectual in law (*a*), and enrolment in the Court of the Duchy Chamber is to be of the same force and validity as enrolment in the Central Office of the Supreme Court (*b*). Where, however, any lease of any of the rents, fines, heriots, reliefs, customary dues or payments is subsisting (*c*), the assurance, so far as it relates to any of the hereditaments comprised in the lease, is to take effect only upon the determination of the lease, abatement being made in the purchase-money in respect of the same as may be agreed on; and the persons entitled to the benefit of the lease are to have all their lawful remedies for recovering payments under the lease as if no such enfranchisement had been made (*d*).

Powers of tenants for life.

484. Tenants for life of copyhold lands and estates within the Duchy may exercise the above powers of enfranchisement or discharge, or purchase timber upon the lands so held. After enfranchisement or discharge, the tenant for life may charge the copyhold lands and estates with the payment of the money paid, and, for securing the repayment of the money with interest, may by deed or writing under his hand and seal, duly executed and attested by two or more credible witnesses, grant, mortgage, lease or demise or otherwise subject the lands and estates so charged for any term or number of years to any person who may advance the same.

(*s*) Statute 19 Geo. 3, c. 45 (Public General Acts, 19 Geo. 3, Vol. II., pp. 976, 977). The provisions of the Crown Lands Act, 1702 (1 Ann. c. 1; stat. 1, c. 7, Ruff.), restricting the alienation of Crown lands generally are repealed so far as they relate to dispositions under these powers (*ibid.*; and see note (*f*), p. 147, *ante*).

(*a*) *Ibid.* (Public General Acts, 19 Geo. 3, Vol. II., p. 978).

(*b*) Courts at Westminster in the Act, now the Central Office, under R. S. C., Ord. 61, r. 9; but see the general provisions for enrolment, p. 238, *post*.

(*c*) The Act refers only to leases which "have" been granted and "are now" subsisting. But, probably, the intention was to embrace future leases.

(*d*) Statute 19 Geo. 3, c. 45.

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These assurances must be made subject to a proviso or condition to cease and be void, or with an express trust to be surrendered, when the money secured with interest is fully paid and satisfied, and with a covenant that the tenants for life will pay and keep down the interest of the money secured during their respective lives, so that no person afterwards coming into possession shall be liable to pay any further arrears of interest than for one year preceding the time when his title accrues and commences. Every such mortgage, grant, lease, or demise is to be valid and effectual in law notwithstanding any settlement, will, trust, use, remainder, or any other incumbrance affecting the land or any part of the same then in being or capable of taking effect. But premises enfranchised and discharged under the above provisions are to remain and be subject and liable to all entails, wills, settlements, mortgages, leases, judgments, uses, trusts, limitations, remainders, reversions, and all other incumbrances as at the time of enfranchisement or discharge (*e*).

Stamp duty and fees.

Enfranchisements under the seal of the Duchy for a consideration not exceeding £10 are free from stamp duty (*f*), but must be sued forth and enrolled at the expense of the grantees according to the scale of fees prescribed (*g*).

Determination of consideration.

485. In the case of failure to agree as to the amount of consideration money to be paid by the tenant upon an enfranchisement, provision is made enabling the matter to be referred by agreement to the Board of Agriculture and Fisheries to appoint a surveyor to determine the amount (*h*).

Exchange.

486. The Chancellor and Council, when it appears to be for the advantage of the land revenues of the Duchy, may exchange any parcel or parcels of land of the Duchy or county palatine for any other parcel or parcels of equal or nearly equal value belonging to any other person, or body politic or corporate, if the latter consent thereto. Upon an exchange the surveyor-general of the Duchy may cause the value of the parcels to be given and taken in exchange to be ascertained by some able and practical surveyor, who must annex to his survey, estimate, or valuation, when completed, an oath (or affirmation or declaration in lieu of an oath (*i*)) taken and subscribed by him before any justice of the peace or magistrate of the United Kingdom (*k*) in the form provided (*l*). The oath, affirmation, or declaration so taken and subscribed, with the survey and estimate, are to be filed in the office of the clerk of

(*e*) Statute 19 Geo. 3, c. 45 (Public General Acts, 19 Geo. 3, Vol. II., pp. 979—981).

(*f*) *Ibid.* (Public General Acts, 19 Geo. 3, Vol. II., p. 981). Above that sum they are to be liable to the ordinary stamp duties upon deeds of conveyance of land (*ibid.*).

(*g*) *Ibid.* For the scale of fees, see Public General Acts, 19 Geo. 3, Vol. II., pp. 982, 983.

(*h*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 68. For the terms of this provision, see p. 195, *ante*. As to the application of this Act to Duchy lands, see s. 98, and title COPYHOLDS.

(*i*) See pp. 25 *et seq.*, *ante*.

(*k*) Who are expressly authorised to administer it.

(*l*) Statute 48 Geo. 3, c. 73, s. 28.

the Council of the Duchy, and the surveyor-general of the Duchy must report to the Chancellor and Council the grounds of his recommendation of the proposed exchange, together with the above valuation of the parcels. If the Chancellor and Council approve of the exchange, and the party with whom it is to be made assents, they are to authorise the proper officers of the Duchy to carry it into effect, subject to any terms and conditions they may think fit. To complete the exchange, the Chancellor and Council are empowered to convey the lands to the party making the exchange under the seal or seals of the Duchy or county palatine, and such party is at the same time to convey to the Chancellor and Council in trust for the Crown in right of the Duchy or county palatine the parcel of land agreed upon. From and immediately after the completion of the exchange the parcels of land conveyed by the Chancellor and Council are to vest in the person or body to whom they are conveyed as fully and effectually, and for the same estate or interest, as the land given in exchange did prior to the exchange; and the parcels conveyed to the Crown in exchange are to vest in the Crown in right of the Duchy and county palatine, as fully and effectually, and be subject to the same application, as the lands granted in exchange prior to the exchange (*m*).

Upon such an exchange the Chancellor and Council may direct the payment or acceptance of any sum agreed upon for equalising the exchange, and money so paid by the Crown is to be paid out of the revenues of the Duchy; any money paid to the Crown is to be invested in Consolidated Bank Annuities in the manner generally applicable to proceeds of sale (*n*).

Afforestation.

487. In order to encourage the raising and planting of trees for timber, the Chancellor and Council are empowered to grant, sell, and release, under the Duchy seal, to the owners of lands held of the Duchy in fee-farm, all timber and other trees then growing or thereafter to grow upon the lands, and which are excepted and reserved to the Crown by the fee-farm grants under which the land is held. The consideration is to be such as may be agreed upon (*o*).

Timber on leased land.

488. With regard to leases under the Duchy seal for terms of life or years, in which timber and other trees are reserved to the Crown, the Chancellor and Council are empowered, by order made in court of revenue of the Duchy, to direct and authorise the surveyors of the woods for the south and north parts of the Duchy to treat with and enter into any contract or agreement with the lessees, for securing to the latter and their representatives such a fair and reasonable allowance or proportion of all moneys arising by the sale of timber or other trees within the lands demised, at any time during

(*m*) Statute 48 Geo. 3, c. 73, s. 28, explained by the statute 52 Geo. 3, c. 161, s. 2. The conveyances by and to the Crown may be in the forms prescribed by s. 30 of the former Act, or as near thereto as may be.

(*n*) Statute 48 Geo. 3, c. 73, s. 29. As to the application of proceeds of sale, see p. 228, *post*.

(*o*) Statute 19 Geo. 3, c. 45 (Public General Acts, 19 Geo. 3, Vol. II., pp. 984, 985).

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the existence of the lease, as may be agreed upon between the surveyors and the lessees; also for allowing to the lessees at the expiration of their leases a like fair and reasonable allowance and proportion in money for all timber and other trees which may be left standing and growing upon their respective farms. After confirmation by order of the Chancellor and Council, such agreements are to be valid and effectual (*p*).

(5) *Application of Proceeds of Sale.*

Payment of purchase-money.

489. The purchase-money arising from the exercise of the various powers of sale and enfranchisement is to be paid into the hands of the receiver-general of the Duchy, whose receipt and acquittance is a full discharge, and purchasers are not liable to see to the application of the same (*q*).

Application of purchase-money.

490. The purchase-money as paid in and received is to be laid out by order of the Chancellor and Council in the purchase of Consolidated Bank Annuities or public funds transferable at the Bank of England in the name of the Duchy of Lancaster, and in that name the Governor and Company of the Bank are authorised and required to permit transfers of the funds, stock, or annuities, which are to be accepted by the receiver-general of the Duchy.

Annuities, funds, or stock so purchased are to remain in the name of the Duchy and not to be transferable without parliamentary authority. But the interest of the same is to be paid by the Bank to the receiver-general of the Duchy (whose receipt is a sufficient discharge) as parcel of the revenues of the Duchy, and he is chargeable and accountable to the Sovereign therefor, subject to charges, incumbrances, and outgoings (taxes only excepted) (*r*).

Redemption of land tax.

491. The receiver-general of the Duchy, with the consent of the Chancellor, may contract and agree with the Land Tax Redemption Commissioners (now the Treasury (*s*)) for the redemption of the land tax charged upon any of the lands, rents, or other revenues within the survey and receipt of the Chancellor and Council of

(*p*) Statute 19 Geo. 3, c. 45 (Public General Acts, 19 Geo. 3, Vol. II., pp. 985, 986).

(*q*) *Ibid.* (Public General Acts, Vol. II., p. 983).

(*r*) *Ibid.* The provision for payment and application of the various moneys arising from sales and enfranchisements takes effect by reference to the Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60), and the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 139, which refer to the statute 19 Geo. 3, c. 45. The various authorities for application in this manner are :—Duchy of Lancaster Lands Act, 1855 (18 & 19 Vict. c. 58), s. 2 (as to sales thereunder); statute 48 Geo. 3, c. 73, s. 12 (as to sales under that Act, except manorial rights and enfranchisements); and statutes 38 Geo. 3, c. 60; 42 Geo. 3, c. 116; 1 & 2 Geo. 4, c. 52, s. 12 (as to sales of forest rights etc.; see as to these p. 223, *ante*); 19 Geo. 3, c. 45 (as to enfranchisements and sales of fee-farm and other rents); Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 139 (as to sales under that Act); statute 48 Geo. 3, c. 73, s. 10 (as to sales of manorial and other rights; see p. 223, *ante*). No special provision appears to be made for the application of moneys arising from grants for churches under the statute 52 Geo. 3, c. 161, which are apparently intended to be free of consideration.

(*s*) Land Tax Redemption Act, 1838 (1 & 2 Vict. c. 58), s. 1.

the Duchy, and proceed to the completion of the contract in the like manner in all respects as in the case of the redemption of any land tax, and subject (except where otherwise provided) to such benefit of preference as is given to any bodies politic or corporate by the Land Tax Redemption Act, 1802 (*a*).

Upon redemption the land is to be freed from the land tax, and the amount of the same during the continuance of any lease or demise in being prior to the redemption of the tax is to be considered as rent due to the Crown and recoverable as such against the lessee, or by the latter against his under-lessee, and collected by the person and subject to the rules directed by the Chancellor and Council (*b*).

Improvement expenses.

492. The Chancellor and Council are empowered by order made in the court of revenue of the Duchy to direct any of the Consolidated Bank Annuities standing in the books at the Bank of England in the name or to the account of the Duchy to be disposed of, and the moneys arising therefrom to be applied in or towards payment of any expenses incurred in the division, inclosure, drainage, embankment, or other improvement of any messuages, lands, or tenements belonging to the Crown in right of the Duchy, and which are certified by the surveyor-general of the Duchy upon oath, to be filed in the Duchy office, to be proper, necessary, advantageous, and beneficial (*c*).

Upon requisition made to them by order of the Chancellor and Council and also under the hand of the Attorney-General of the Duchy, the Governor and Company of the Bank of England are required to permit the person named and empowered by the order to make any sale or transfer of such Bank annuities; and the sale or transfer being made by the person so authorised by signature of his own proper name for and on behalf of the Crown in right of the Duchy is to be valid, legal, and effectual for the sale or transfer of the annuities (*d*).

Special powers.

493. In addition to the above powers which are generally applicable to the purchase-moneys received upon sales of Duchy lands, special powers are conferred upon the Chancellor and Council

(*a*) 42 Geo. 3, c. 116, s. 131. By the same section investment of the purchase-moneys is directed in the manner provided by the statute 19 Geo. 3, c. 45, as to which see the text, *supra*. But this provision is now, it seems, partly obsolete, since payment for redemption may now be made by any owner by payment to the Commissioners of Inland Revenue of a capital sum, equal to thirty times the sum assessed for land tax, under the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 32. Under the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), payment was directed to be made by transfer of stock to the National Debt Commissioners. See also title LAND TAX.

(*b*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 141.

(*c*) Statute 57 Geo. 3, c. 97, s. 25.

(*d*) *Ibid.* The Act is declared to be a full and complete indemnity and discharge to the Governor and Company of the Bank, their officers and servants, for all things done or permitted in virtue or obedience to the order of the Chancellor and Council; and the same is not to be questioned or impeached in any court of law or equity, or be in any manner to their prejudice, loss, or detriment (*ibid.*, s. 26).

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as to moneys arising from sales authorised by the Duchy of Lancaster Lands Act, 1855 (*e*), of laying out the same, either without any previous investment or after such, and either alone or together with any money or funds belonging to the Duchy, in the improvements authorised as above (*f*), or in the purchase of lands under that Act (*g*).

As to the sale of fee-farm and other rents, and the enfranchisement and discharge of copyholds (*h*), special provision is also made enabling the moneys arising therefrom (*i*) to be applied in payment and discharge of any sums which were at the date when the Act was passed charged upon any lands or tenements of the Duchy by reason of any inclosure or division made by authority of Parliament; and of all charges which might thereafter be incurred by order of the Chancellor and Council in the division, inclosure, drainage, or other improvement of any allotment set out and assigned to the Crown by the authority of Parliament (*k*); also for erecting suitable habitations and other convenient buildings for the tenants of the allotments as the Chancellor and Council think fit (*l*).

Until the whole of the above charges and expenses have been paid in the manner authorised, applications of the purchase-money may be made without prior investment in Consolidated Bank Annuities or other public funds (*m*). But when the charges and expenses have been satisfied, the residue of the purchase-money, and all future moneys arising from the exercise of the powers, are to be invested, and the interest and dividends disposed of, under the general provisions stated above (*n*).

(*e*) 18 & 19 Vict. c. 58, s. 1; and see p. 221, *ante*.

(*f*) Under the statute 57 Geo. 3, c. 97; see p. 229, *ante*.

(*g*) 18 & 19 Vict. c. 58, s. 2. As to the power of purchasing lands, see p. 234, *post*. With regard to money invested in Bank annuities under the Duchy of Lancaster Lands Act, 1855 (18 & 19 Vict. c. 58), the Chancellor and Council are to have the like powers as are conferred by the 57 Geo. 3, c. 97, as to which, see p. 229, *ante* (*ibid.*).

(*h*) As to the sale of rents, see p. 224, *ante;* as to enfranchisements, see *ibid.*

(*i*) The preamble to the Act recites that at the date when the Act was passed moneys arising from sales and enfranchisements had been laid out in the purchase of £4,859 12*s.* 3*d.* consolidated annuities, and the Act authorises the application of that sum in the manner stated, in addition to future moneys to arise.

(*k*) The recitals to the section state that by means of inclosures and divisions of several common fields and waste lands, being parcel of the liberties and franchises of the Duchy, made under the authority of divers Acts, several sums had been and remained charged on lands of the Crown within such liberties and franchises; also that certain other waste lands within the liberties and franchises of the Duchy had, by authority of Parliament, lately been set out and awarded to the Crown, and that considerable expense would be necessarily incurred in inclosing, draining, fencing, building upon, and improving the same.

(*l*) Statute 27 Geo. 3, c. 34, s. 4. The usual words follow requiring the Bank to permit the person empowered by the order of the Chancellor and Council to make the necessary transfer of stock standing in the name of the Duchy at the Bank.

(*m*) See p. 228, *ante*.

(*n*) Statute 27 Geo. 3, c. 34, s. 5. The provisions as to investments are those contained in the statute 19 Geo. 3, c. 45, as to which see p. 228, *ante*.

(6) *Leases of Duchy Lands.*

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494. Leases of Duchy lands and hereditaments may be granted for a term or estate not exceeding thirty-one years or three lives, or for some term of years determinable upon one, two, or three lives, provided they are made to commence from the date when they are made; or if the lease or grant is to take effect in reversion or expectancy, then so that the term, together with any estates of the same premises in possession, does not exceed thirty-one years in the whole (*o*).

Extent of leases.

In the above leases the tenant must be made punishable for waste, and the rent reserved must either be the ancient or most usual rent, or more, or such as has been reserved for the greater part of twenty years before the granting of the lease. Where no such rent has been reserved or payable, a reasonable rent must be reserved of not less than the third part of the clear yearly value. In all cases the rent must be made payable to the Crown during the whole term (*p*).

Leases for ninety-nine years.

495. Leases for ninety-nine years or three lives may be granted in the following cases:—(1) Building leases etc. Where land is fit and proper for the erection of houses or other buildings, or for the necessary yards, gardens, curtilages, and other appurtenances to be used and enjoyed therewith, and is by the order of the Chancellor and Council directed to be reserved or set apart and appropriated to that use; (2) or where the lessees or grantees agree and covenant to erect buildings thereon of greater yearly value than the land to be leased or granted; (3) or where the greatest part of the yearly value of any tenements or hereditaments at the time of making the lease or grant consists of any building or buildings thereon (*q*).

Such lands may be granted for any estate not exceeding ninety-nine years or three lives computed from the date when the lease or grant is made to any person, or body politic or corporate, under the seal or seals of the Duchy and county palatine; or, if it be made to take effect in reversion or expectancy, then so that the term and estate granted, together with the term or estate in possession of the same land, does not exceed similar periods computed from the date when the grant or lease is made (*r*).

Rents to be reserved.

496. In the above leases for ninety-nine years or three lives the following rents must be reserved:—

(1) Where there is any substantial building upon the land, or (*s*) the buildings thereupon do not require or are not intended and agreed to be rebuilt, an annual rent of not less than two-thirds of

Wider powers of application are exercisable with regard to moneys arising under the Duchy of Lancaster Lands Act, 1855 (18 & 19 Vict. c. 58) (see the text, *supra*).

(*o*) Crown Lands Act, 1702 (1 Ann. c. 1; stat. 1, c. 7, Ruff.), s. 5.

(*p*) *Ibid.*

(*q*) Statute 52 Geo. 3, c. 161, s. 1.

(*r*) *Ibid.*

(*s*) The meaning of "or" here does not seem clear; "and" would appear to be intended.

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such annual sum, as may be considered by the Chancellor and Council reasonable, must be reserved for the term and estate intended to be granted, there being also paid a fine or fines to the amount of the remaining part of the annual sum, subject to a discount not to be computed to a higher rate than the highest legal interest at the time when the grant or lease is made (*t*).

(2) Where there is no substantial building upon the land, or where the buildings thereupon require or are intended and agreed to be forthwith rebuilt, or other new buildings are to be erected, the annual rent reserved is to be such as the Chancellor and Council deem reasonable, without taking any fine, and so that the lease or grant contains a covenant or condition by the lessee or grantee for the erection of proper and substantial houses or other buildings within a reasonable time to be limited for that purpose, and any other covenants for repair and doing other acts which the Chancellor and Council think reasonable (*a*). The rent in this case must be reserved free and clear of all manner of taxes and assessments whatsoever during the whole of the term granted, except such rent as the Chancellor and Council may allow during part of the term, not exceeding three years in any case (*b*).

Every such grantee or lessee must duly sign, seal, and deliver a counterpart of the grant or lease (*c*).

Leases for fifty years.

497. Where the greatest part of the yearly value of any hereditaments at the time when the lease is granted consists of buildings which require to be repaired or rebuilt, to encourage the reparation or rebuilding of the same leases may be granted to any person for any term or estate not exceeding fifty years or three lives.

The leases must be made to take effect from the date when they are made, or if in reversion or expectancy, then so that the term together with any estates of the same premises in possession does not exceed fifty years or three lives.

Tenants must be made punishable for waste, and the rent reserved must be the same as in the case of leases for thirty-one years or three lives (*d*).

Lease of adjacent land.

498. Where any new edifice or building is erected or agreed to be erected on land belonging to the Crown within the survey of the Duchy, or held under any lease from the Crown, for the enlargement of, and to be united to and occupied with, any other house or building held under any other lease from the Crown, a new lease may be granted, for any term not exceeding ninety-nine years, of the ground upon which the building is or is agreed to be erected, and also of all or any part of any other hereditaments contained in the lease, provided the greater part of the yearly value of the hereditaments so granted consists of the buildings upon the same, or of

(*t*) 52 Geo. 3, c. 161, s. 1.
(*a*) *Ibid.*
(*b*) *Ibid.*
(*c*) *Ibid.* This provision applies, it seems, to leases both under (1) and under (2).
(*d*) Crown Lands Act, 1702 (1 Ann. c. 1 ; stat. 1, c. 7, Ruff.), s. 6.

ground set apart and appropriated for building, or for necessary gardens, yards, curtilages, or other appurtenances (*e*).

Gardens etc.

499. Land deemed by the Chancellor and Council fit and proper for gardens, yards, curtilages, and other appurtenances to be used and enjoyed with any house or building erected or to be erected upon ground belonging to the Crown or to any other proprietor may be demised or granted under the seal of the Duchy and county palatine to any person or body politic or corporate for any term or estate not exceeding ninety-nine years, computed from the date or making of the same; or, if it be made to take effect in reversion or expectancy, then so that the term granted together with the term or estate in possession of the same land does not exceed ninety-nine years from the date or making of the same (*f*). No such land, however, to be used with any house or building held under lease from the Crown, may be granted or demised for any term exceeding in duration the term for which the house or building is held (*g*).

These leases for yards, gardens etc. may be renewed at any time during the continuance of the lease, subject to similar provisions and conditions to those in the original lease (*h*); or if renewed at the same time as the leases of the house or building held under lease from the Crown to which they are attached are renewed, then for the same term and under the like conditions as in the lease of the house or building (*i*).

In all such cases where renewals may be made, a new lease or grant may be made, upon surrender of the original lease, upon the same terms and conditions as in the case of an ordinary renewal. But the charges and expenses of any new lease so made upon surrender of a subsisting lease are to be paid by the lessee (*k*).

Extension of power.

500. The above power of leasing for yards, gardens, curtilages, or appurtenances has been extended to land proper to be let, used, or appropriated to any purpose calculated to afford convenience or accommodation to the occupiers or inhabitants of any house erected upon land belonging to the Crown or any other proprietor, and leases of such lands may be made for any term or estate not exceeding ninety-nine years, to be computed from the date or making of the same, with any powers, privileges, and authorities which may be thought fit and requisite for promoting the object and intent of the grant, and at such annual rent, without the taking of any fine, as the Chancellor and Council think fit (*l*).

(*e*) Statute 48 Geo. 3, c. 73, s. 20.
(*f*) *Ibid.*, s. 1.
(*g*) *Ibid.*, s. 2.
(*h*) *Ibid.*, ss. 4, 5. Where the lessee has demised or agreed to demise the land for building improvements, or has entered into any covenant or engagement in consequence of which he would, by reason of the improvements to be made, be bound to pay upon renewal more than he would be entitled to receive from the under-lessee, a just abatement in the rent and fine to be reserved on such renewal may be made (*ibid.*, s. 4; statute 34 Geo. 3, c. 75, s. 6).
(*i*) Statute 48 Geo. 3, c. 73, s. 4.
(*k*) *Ibid.*, ss. 7, 8.
(*l*) Statute 52 Geo. 3, c. 161, s. 1. It does not seem clear whether the other

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501. Certain leases of Duchy lands may be granted under the Military Lands Act, 1892 (*m*).

Leases for military purposes.

502. Leases of Duchy lands for the purposes of small holdings or allotments may be granted by the Chancellor and Council of the Duchy to a council (*n*) by deed under the seal of the Duchy in the name of His Majesty, his heirs and successors, for a term not exceeding thirty-five years, either with or without such right of renewal as is conferred in the case of land hired compulsorily for those purposes (*o*).

Leases for small holdings and allotments.

(7) *Agreements with Mortgagees and Lessees.*

Discharge of mortgages.

503. Agreements may be made by order of the Chancellor and Council with mortgagees of Duchy lands who have become such under statutory authority, or with Crown lessees of the lands so mortgaged, or with the husbands, guardians, trustees, or committees of any such mortgagees or lessees, being women under coverture or any other disability, for the discharge of any mortgage, and for charging the Duchy lands and the lessees of the same with the payment of interest of moneys advanced by order of the Chancellor and Council in pursuance of any such agreement; and such agreements are to be valid and effectual notwithstanding any disability of the parties thereto (*p*).

The interest, or money in respect of interest, payable to the Crown by any of its lessees under these agreements in respect of money paid by the direction of the Chancellor and Council in pursuance of the above authority is to be deemed as or in the nature of rent payable to the Crown, and issuing out of the lands and hereditaments held and enjoyed by the parties to the agreement and their representatives by virtue of any such subsisting lease.

Upon non-payment of the interest, or money in respect of interest, according to the tenor and effect of the agreement, the same may be distrained for and become chargeable in all respects as if it were rent due from the lessees and reserved by the subsisting lease (*q*).

(8) *Purchases.*

Purchase of land by the Duchy.

504. The Chancellor and Council may contract and agree with any person, or body politic, corporate, or collegiate, for the purchase

provisions as to leases for gardens, yards etc., under the statute 48 Geo. 3, c. 73, extend to this section, but, probably, the intention is that they should.

(*m*) 55 & 56 Vict. c. 43, s. 10 (1). As to these provisions, see p. 201, *ante*.

(*n*) "Council" under the Act may be either the county, borough, district, or parish council, according to the provisions of the Act which apply.

(*o*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 40 (1), (2). This provision is subject to any consent or conditions which may be required (if any) (*ibid.*, s. 40 (1)). As to the renewal of leases of land hired compulsorily for not less than fourteen or more than thirty-five years, see *ibid.*, s. 44. As to the application of the Act to Crown lands generally, see p. 191, *ante*. As to small holdings and allotments generally, see titles ALLOTMENTS, Vol. I., p. 331; SMALL HOLDINGS.

(*p*) Statute 27 Geo. 3, c. 34, s. 6.

(*q*) *Ibid.*, s. 7.

of, and may actually purchase, any land they may deem convenient to be held with the possessions of the Duchy (*r*).

Land so purchased is to be conveyed to the use of His Majesty, his heirs or successors, in right of the Duchy of Lancaster, either in the form provided or in any more convenient form, and is to vest in the Sovereign, his heirs and successors, in the same right, and as fully and effectually, and be held with the like incidents, as other land belonging to the Duchy (*s*).

505. With these provisions those of the Lands Clauses Consolidation Act, 1845 (*t*), are incorporated, but no land is to be purchased by the Chancellor and Council otherwise than by agreement (*u*).

(9) *Application of certain General Acts* (*a*).

Agricultural Holdings Act, 1908.

506. The Agricultural Holdings Act, 1908 (*b*), applies to lands belonging to the Crown in right of the Duchy of Lancaster, and with respect to any such land the Chancellor of the Duchy is to represent the Crown and to be deemed the landlord for the purposes of the Act (*c*).

The amount of any compensation payable by the Chancellor of the Duchy in respect of improvements comprised in Part I. or Part II. of the First Schedule to the Act (*d*) is to be raised and paid as an expense incurred in improvement of land belonging to the Crown in right of the Duchy under the Act relating thereto (*e*).

This provision also applies to improvements comprised in the Third Schedule to the Act in the case of holdings in respect of which it is agreed in writing on or after the 1st January, 1896, that the holding shall be let or treated as a market garden (*f*).

(*r*) Duchy of Lancaster Lands Act, 1855 (18 & 19 Vict. c. 58), s. 3. Power of annexing land to the Duchy by letters patent is conferred by an earlier Act; see p. 220, *ante*.

(*s*) Duchy of Lancaster Lands Act, 1855 (18 & 19 Vict. c. 58), s. 3. For the statutory form of conveyance, see *ibid.*, Sched. Y.

(*t*) 8 & 9 Vict. c. 18. Presumably the later Acts are also included, as they form part of a single code and are read together as such; see *R.* v. *London Corporation* (1867), L. R. 2 Q. B. 292. See title COMPULSORY PURCHASE OF LAND AND COMPENSATION, Vol. VI., p. 1.

(*u*) Duchy of Lancaster Lands Act, 1855 (18 & 19 Vict. c. 58), s. 3.

(*a*) In addition to the Acts mentioned in the text, there are numerous other Acts containing provisions for their application to Duchy lands, *e.g.*, the Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 17 (see titles COMMONS, Vol. IV., p. 554; COPYHOLDS; HIGHWAYS, STREETS, AND BRIDGES; OPEN SPACES AND RECREATION GROUNDS); the Land Registry Act, 1862 (25 & 26 Vict. c. 53), s. 114; the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 65, as amended by the Land Transfer Act, 1897 (60 & 61 Vict. c. 55), s. 18, Schedule (see titles REAL PROPERTY AND CHATTELS REAL; SALE OF LAND); the Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 13 (see p. 180, *ante*); the Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 40 (2) (see titles ALLOTMENTS, Vol. I., p. 345; SMALL HOLDINGS).

(*b*) 8 Edw. 7, c. 28.

(*c*) *Ibid.*, s. 38 (1), (2).

(*d*) As to these improvements, see p. 191, *ante*.

(*e*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 38 (3). The statute 57 Geo. 3, c. 97, s. 25, is the Act referred to, for the provisions of which see p. 229, *ante*.

(*f*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 42 (1), (i.), (b).

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The amount of any compensation payable by the Chancellor of the Duchy in respect of improvements comprised in Part III. of the First Schedule (*g*) to the Agricultural Holdings Act, 1908, is to be paid out of the annual revenues of the Duchy (*h*).

Improvement of Land Act, 1864.

507. Nothing contained in the Improvement of Land Act, 1864, is to authorise any person to purchase, take, use, or interfere with any lands, soil, or water, or any right in respect of the same belonging to the Crown in right of the Duchy of Lancaster, without the previous consent in writing of the Chancellor of the Duchy (which consent the said Chancellor is authorised to give); and nothing in the Act is to take away, lessen, prejudice, or alter any of the rights, privileges, powers, or authorities vested in or enjoyed by the Crown in right of the Duchy (*i*).

Copyhold Act, 1894.

508. Certain provisions of the Copyhold Act, 1894, are expressly extended to manors and lands vested in the Crown in right of the Duchy of Lancaster (*k*); except, however, where expressly provided, the Act does not apply thereto (*l*).

Intestates Estates Act, 1884.

509. The Intestates Estates Act, 1884, extends to the Duchy of Lancaster, with the addition that the Chancellor, the Attorney-General and the solicitor of the Duchy respectively are to be substituted for the Treasury, the Attorney-General, and the Treasury Solicitor respectively, and that the proceeds of any sale are to be applicable and dealt with to all intents and purposes as they would or might have been applied or dealt with if the hereditaments, estate, or interest had been sold under or in pursuance of any other power in that behalf (*m*).

Metropolis Management Act, 1862.

510. The Metropolis Management Amendment Act, 1862, does not authorise the various local bodies to whom the administration of the Act is intrusted (*n*) to exercise the powers of the Act

(*g*) As to these improvements, see title AGRICULTURE, Vol. I., p. 258.

(*h*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 38 (4). As to the application of the Act to Crown lands generally, see p. 191, *ante*. As to agricultural holdings, generally, see title AGRICULTURE, Vol. I., p. 239.

(*i*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 38.

(*k*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 98. For the provisions see p. 226, *ante*.

(*l*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 95 (f).

(*m*) Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 8. As to the devolution of real estate on an intestacy and escheat, see title REAL PROPERTY AND CHATTELS REAL. As to the general practice on escheat, see title CROWN PRACTICE. As to the distribution of personal estate on an intestacy and the Crown's right to *bona vacantia*, see p. 209, *ante*, and title DESCENT AND DISTRIBUTION. As to the power of the court to order a sale where it appears that the Crown is entitled to an interest legal or equitable, see p. 158, *ante*.

(*n*) The powers formerly exercisable by the bodies mentioned in the Act have been transferred, as to the Metropolitan Board of Works, to the London County Council (Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (8)), and as to vestries and district boards, to the urban and rural district councils (Local Government Act, 1894 (56 & 57 Vict. c. 73), and, in the metropolis, to the borough councils (London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4), except where powers have been retained by vestries. See, generally, titles LOCAL GOVERNMENT; METROPOLIS.

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with regard to the Duchy of Lancaster without the previous consent in writing of the Chancellor of the Duchy (*o*).

511. The Defence Act, 1842, contains an express saving of the rights of the Crown in respect of the hereditary possessions of the Duchy of Lancaster (*p*).

Defence Act, 1842.

512. The powers of contracting and agreeing for the redemption of land tax conferred by the Land Tax Redemption Act, 1802, upon persons having any interest in lands (except such interests as are expressly excluded) do not extend to tenants holding lands or tenements under the Crown within the survey and receipt of the Duchy of Lancaster for any term of years, or from year to year, or at will (*q*); and the powers of sale and enfranchisement for raising money for redeeming land tax conferred by the same Act upon persons holding, under a Crown grant or Act of Parliament, lands or hereditaments in which the Crown has an estate, right, or interest in remainder, reversion, or expectancy do not extend to persons holding certain interests in lands or hereditaments in the Duchy (*r*).

Land Tax Redemption Act, 1802.

Commissions of sewers.

513. Commissions of sewers appointed by the Crown, or by the Crown on the recommendation of the Board of Agriculture and Fisheries (*s*), may be directed into the Duchy of Lancaster, and, where such a commission is granted by the Crown without the intervention of the Board of Agriculture and Fisheries, the commissioners are to be appointed at the discretion of the Lord Chancellor and the Lord Treasurer (now the Treasury Commissioners), the Lord Chief Justice and the Chancellor of the Duchy, or any three of them (of whom the Lord Chancellor and the Chancellor of the Duchy must always be two), and two commissions are to be made according to the tenor in the Act provided, one under the Great Seal of England and the other under the Duchy seal (*t*).

Duchy lands are liable to rates and taxes imposed by the commissioners so appointed (*u*).

(*o*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 116, and see p. 201, *ante*, for the express provisions. As to the provisions of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), in general, see title METROPOLIS.

(*p*) Defence Act, 1842 (5 & 6 Vict. c. 94), s. 39. For the provision, see p. 202, *ante*.

(*q*) Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), s. 10.

(*r*) *Ibid.*, s. 71. As to the powers conferred, see p. 178, *ante*. As to the interests in Duchy lands which are excluded, see p. 179, *ante*.

(*s*) The Land Drainage Act, 1861 (24 & 25 Vict. c. 133), ss. 4, 5, enables commissions to be directed into all parts of England (*semble*, including the Duchy of Lancaster) on recommendation of the Board of Agriculture and Fisheries on petition signed by one-tenth part of the proprietors of land within the area proposed to be affected. There are no special provisions as to the Duchy of Lancaster, and the Act expressly preserves all other powers of directing commissions (*ibid.*, s. 60). See, generally, titles PUBLIC HEALTH ETC.; SEWERS AND DRAINS.

(*t*) Statute 23 Hen. 8, c. 5, s. 9 (s. 14, Ruff.). The fees to be taken for any writ of *dedimus potestatem* under the Duchy seal conferring power to administer the oath to the commissioners (see *ibid.*, s. 2) are to be only such as are directed by the statute 23 Hen. 8, c. 5 (3 & 4 Edw. 6, c. 8, s. 2).

(*u*) *Ibid.*, s. 6 (s. 9, Ruff.), and see p. 120, *ante*. See, generally, titles PUBLIC HEALTH ETC.; SEWERS AND DRAINS.

SECT. 4.

(10) *Enrolment.*

Revenues of Hereditary Nature retained by the Crown.

Enrolment of deeds.

514. Every deed or instrument by which any manors, messuages, lands, or hereditaments, being parcel or possessions of the Duchy of Lancaster, are purchased, sold, exchanged, leased, licensed to be demised, enfranchised, or granted under any Act or otherwise must be enrolled in the office of the Duchy within six calendar months after the date of the deed or instrument; and the keeper of the records of the Duchy is required to enrol the same in order of time as they are brought to the office, and to certify the fact of enrolment upon the deed or instrument under his hand, or the hand of his deputy for the time being (*a*).

Where the enrolment of any instrument or minute or document is or has been omitted or delayed beyond the period provided as above, the Chancellor and Council, on reasonable cause shown, may permit the enrolment or entry to be made *nunc pro tunc*, and, when so made, it is to be as valid and effectual as if made in due time (*b*).

Similar provision is made with regard to the validity of examined copies and certificates of the enrolment and contents of deeds and documents as in the case of the Duchy of Cornwall (*c*).

SUB-SECT. 2.—*The Revenues of the Duchy of Cornwall.*

(1) *The Title to the Duchy.*

Duchy of Cornwall.

515. The title of Duke of Cornwall and the inheritance of the Duchy were created by Edward III. in the eleventh year of his reign (1337) and vested in the Black Prince by charter having the authority of Parliament (*d*) to hold "*eidem duci et ipsius et haeredum suorum regum Angliae filiis primogenitis et dicti loci ducibus in regno Angliae haereditarie successuris*" (*e*).

This charter, being equivalent to an Act of Parliament, has been held to be good, though it creates a mode of descent unknown to the common law (*f*), which it is doubtful whether the King's grant can do without parliamentary authority (*g*); and the King's eldest son, being also heir apparent, succeeds to the title immediately he is born by right of inheritance without fresh creation (*h*).

(*a*) Statute 7 & 8 Vict. c. 65, ss. 30, 31, as applied to the Duchy of Lancaster by statute 11 & 12 Vict. c. 83, s. 14.

(*b*) Statutes 7 & 8 Vict. c. 65, s. 35; 11 & 12 Vict. c. 83, s. 14.

(*c*) Statute 11 & 12 Vict. c. 83, ss. 6, 14. As to the provision, see p. 254, *post.*

(*d*) "*Per ipsum regem et totum concilium in parliamento*" (see 1 Bl. Com., 14th ed., 225, note).

(*e*) *The Prince's Case* (1606), 8 Co. Rep. 1 a, 16 b. See also the preamble to the statute 7 & 8 Vict. c. 105. For excerpts from the charter itself, see *Vice* v. *Thomas* (1837), Smirke's Rep., Appendix, pp. 20, 21; *Rowe* v. *Brenton* (1828), Concanen's Rep. p. 62, and Appendix, pp. 45—47. As to the property comprised in the Duchy generally in the year 1837, see speech of Lord Brougham on the Civil List Bill, 1837 (Parliamentary Debates, 3rd series, Vol. XXXIX., pp. 1358—1365).

(*f*) *The Prince's Case, supra*, at pp. 16 a, 20 a. The words "by authority of Parliament" in a royal charter are sufficient to make it an Act of Parliament (*ibid.*). Acts concerning the Prince of Wales are public Acts to be judicially noticed, "*coruscat enim princeps radiis regis patris sui, et censetur una persona cum ipso rege*" (*ibid.*, 28 b).

(*g*) See Vol. VI., p. 487.

(*h*) *The Prince's Case, supra*, at p. 16 b; 1 Bl. Com., 14th ed., 225; *Rowe* v.

On the death of the heir apparent without leaving issue the next surviving son of the Sovereign succeeds (*i*); but if the heir apparent leaves issue (who would in that case become heir apparent), the Duchy does not vest in such issue, nor in the next surviving son of the Sovereign, but reverts to the Crown (*k*), under the general rule by which, in the absence of an eldest son and heir apparent, the Duchy vests in the Sovereign (*l*).

(2) *General Powers of Management.*

Statutory powers.

516. Under the original constitution of the Duchy the lands and possessions of the Duchy are inalienable from it, and sales and other dispositions by the Duke of Cornwall or the Sovereign must therefore be made under the express powers conferred by statute; otherwise they will be of doubtful validity as against future Dukes of Cornwall (*m*).

Management during minority of Duke of Cornwall.

517. The eldest son of the Sovereign being heir apparent becomes seised of the Duchy in fee immediately he is born (*n*), and not being affected at common law, it is said, with the disabilities of minority in relation thereto (*o*), may determine by writ of *scire facias* leases and appointments made by the Sovereign (*p*). But during such time as any future Duke of Cornwall is under the age of twenty-one years the powers, privileges, and authorities vested in the Duke of Cornwall under the Duchy of Cornwall Management Acts, 1863 to 1893 (*a*), or otherwise, are to be exercisable

Brenton (1828), Concanen's Rep. p. 62. A daughter, though heiress presumptive, does not become Duchess of Cornwall (Com. Dig. tit. Roy., G a).

(*i*) *Lomax* v. *Holmden* (1749), 1 Ves. Sen. 290, 294, 295, *primogenitus* being taken in the sense of "eldest" son. Lord HARDWICKE, L.C., cites Henry VIII., Edward VI., and Charles I. as instances of second sons taking by inheritance in their father's lifetime (*ibid.* 294). Lord COKE affirms that the Duchy descends to the "first-begotten" sons only during their father's life, and that second-born sons only take by fresh creation (see *The Prince's Case* (1606), 8 Co. Rep. 1 a, 29 b, 30 a). But this view has been generally considered erroneous (*Lomax* v. *Holmden*, *supra*, *per* Lord HARDWICKE, L.C., at pp. 294, 295; 1 Bl. Com., 14th ed., 224, note 10), and the Duchy has become vested in the present heir apparent by inheritance, though he is the second son of the Sovereign.

(*k*) 1 Bl. Com., 14th ed., 224, note.

(*l*) Com. Dig. tit. Roy., G a. The issue of the King's eldest son and heir apparent do not succeed during the life of the Sovereign (*ibid.*; *The Prince's Case*, *supra*, at pp. 29 b, 30 a).

(*m*) See Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), preamble.

(*n*) *The Prince's Case*, *supra*, at pp. 16 b, 27 a; 1 Bl. Com., 14th ed., 224.

(*o*) 1 Bl. Com., 14th ed., 224, note 10.

(*p*) Com. Dig. tit. Roy., G a; and see *Atkins* (*Sir Robert*) v. *Mountague* (1671), 1 Cas. in Ch. 214, 215.

(*a*) These Acts are to be construed together as one Act, and cited collectively as above (Duchy of Cornwall Management Act, 1893 (56 & 57 Vict. c. 20), s. 3). Dealings with the Duchy possessions are now principally regulated by the Duchy of Cornwall Management Acts, 1863 to 1893, the first of which was intended to consolidate the law (see the preamble to the Act), and which form a complete code by themselves. Nothing in these Acts, however, is to take away, alter, or prejudice (except so far as expressly rescinded or altered by the Acts) any provisions contained in the Inclosure Acts or any other Acts relating to the possessions, revenues, or management of the Duchy.

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Revenues of Hereditary Nature retained by the Crown.

by the Sovereign as guardian of the Duke, or by such persons, acting under the authority of the Sovereign, as may be appointed by warrant under the royal sign manual countersigned by any three or more Treasury commissioners. All acts and things so done are to be as valid and effectual in law as if done by the Duke of Cornwall himself. But all offices, appointments, and employments relating to the Duchy granted during the minority of the Duke, and held during pleasure, may be determined by the latter after he has attained the age of twenty-one years (*b*).

Management during non-existence of a Duke.

518. Whenever for the time being no Duke of Cornwall is in existence, the Sovereign may by similar warrant authorise so many of the regular officers of the Duchy, or any other persons being not less than three nor more than five in number, as seems fit, to exercise in his name and on his behalf the powers, privileges, and authorities in relation to the Duchy vested in him (*c*), and may commit the custody of the Duchy seal to any one or more of the regular officers of the Duchy (*d*).

Custody of the seal.

519. Instruments relating to the Duchy are, in general, required to be passed under the Duchy seal (*e*), which is directed to be held by the personage for the time being entitled to the Duchy possessions, or by some person lawfully appointed to be the keeper of the same (*f*).

Actions relating to the Duchy.

520. At common law, it seems, the Prince of Wales may sue and be sued in the ordinary manner (*g*), being represented in all legal proceedings relating to the Duchy of Cornwall by the Attorney-General to the Duchy. Where there is no Duke of Cornwall in existence, the King's Attorney-General, as a rule, will represent the Duke (*h*). In such proceedings similar privileges are, it seems, enjoyed by the Duke of Cornwall (or the Sovereign, when the Duchy is vested in him) as in the case of suits and actions by and against the Crown (*i*).

(*b*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 38. During the minority of His present Majesty powers were conferred upon a council for the Prince of Wales (see the statutes 7 & 8 Vict. c. 65; 25 & 26 Vict. c. 49).

(*c*) Under the Duchy of Cornwall Management Acts or otherwise.

(*d*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 39.

(*e*) For the cases in which documents are required to be passed under the Duchy seal, see p. 243, *post*.

(*f*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 2.

(*g*) See Vol. VI., p. 369.

(*h*) *A.-G. to the Prince of Wales* v. *St. Aubyn* (1811) Wight. 167, 255. When the Prince of Wales has not obtained livery of the Duchy, the legal proceedings are, it seems, conducted by the King's Attorney-General, with the Attorney-General to the Duchy; and when the Prince dies *pendente lite* the proceedings are carried on by the King's Attorney-General without commencing fresh proceedings (*ibid.*, at pp. 255, 256).

(*i*) Thus, he may, it seems, file an English information with regard to Duchy lands (*A.-G. to the Prince of Wales* v. *St. Aubyn*, *supra*), and the rights of the Crown as to venue attach, it seems, to the Duke of Cornwall (*A.-G. to the Prince of Wales* v. *Crossman* (1866), L. R. 1 Exch. 381). See also, as to informations, *A.-G.* v. *Plymouth Corporation* (1754), Wight. 134; *A.-G.* v. *Lambe* (1838), 3 Y. & C. (EX.) 162; *A.-G. to the Prince of Wales* v. *Lambe* (1848), 11 Beav. 213; *A.-G. to the Prince of Wales* v. *Bristol Waterworks Co.* (1855), 10 Exch. 884.

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521. Contracts or agreements touching any matter or thing to be done under the Duchy of Cornwall Management Acts may now be made by persons nominated by the Duke of Cornwall by sign manual warrant or otherwise; and claims by persons as against the Duke under any contract or agreement relating to the possessions of the Duchy can only be enforced in equity by suit as against the Keeper of the Records of the Duchy, and the Duke of Cornwall is not personally liable to any action or other proceeding in consequence of such contract or agreement, or concerning any other matter or thing done, or purporting to be done, under the authority of the Duchy of Cornwall Management Acts, or for any omission or otherwise (*k*). The Keeper of the Records of the Duchy must be indemnified out of the revenues of the Duchy against the costs, expenses, and losses attending any suit so brought against him (*l*).

Limitation of actions.

Officers of the Duchy.

522. The officers usually appointed for the Duchy by the Duke of Cornwall, or by the Sovereign whilst in possession of the Duchy, subject (as to offices held during pleasure) to removal by the Duke of Cornwall on his attaining his majority (*m*), are the Lord Warden of the Stannaries in Cornwall and Devon, the Keeper of the Privy Seal, the Attorney-General, and the Receiver-General, together with an auditor, secretary and keeper of the records, assistant secretary, clerk accountant and deputy receiver, law clerk, and land stewards.

Where before the 6th August, 1844 (*n*), duties have been imposed by statute upon any officer, and it becomes expedient that such duties should be given to some other officer, the Duke of Cornwall may appoint any officer to perform and fulfil the duties so imposed upon any other officer (*o*).

The Stannaries Court.

523. The jurisdiction of the Stannaries Court was abolished in 1896, and the jurisdiction and powers of the Vice-Warden of the Stannaries transferred to and vested in the county court of Cornwall. Anything required to be done by, to, or before the registrar or any clerk of the Stannaries Court is to be done by, to, or before the registrar or any clerk of the county court of Cornwall. The place of sitting of the judge is at Truro, unless he otherwise directs on the ground that some other place will be more convenient to the suitors. The place of sitting of the registrar is at the county court where the proceedings are commenced, unless the judge for the convenience of the parties otherwise directs. Arrangements for

(*k*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 34. As to suits against the Prince of Wales, see Vol. VI., p. 369, note (*n*); and p. 240, *ante*. As to limitation of actions against the Duke of Cornwall, see p. 267, *post*, and title LIMITATION OF ACTIONS.

(*l*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 34.

(*m*) *Ibid.*, s. 38; and see p. 240, *ante*.

(*n*) The words "at any time heretofore" would seem to limit the application of this provision to duties imposed before the passing of the Act.

(*o*) Statute 7 & 8 Vict. c. 65, s. 39. Such appointments by the Duke may be made either for one case, or for any class of cases, or for all cases generally, and as to all the duties or powers of any officer or some only (*ibid.*).

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the custody of the records are made by the corporation of Truro in consultation with the judge of the county court, subject to the Lord Chancellor's approval (*p*).

Annual accounts.

524. Accounts of the receipts and disbursements of the Duchy must be submitted annually to the Treasury by the proper officers of the Duchy, in the form and with the explanations required by the Treasury. This annual account must be presented by the Treasury to both Houses of Parliament within one calendar month after the first meeting of Parliament subsequent to the 1st January in each year (*q*).

Treasury control.

525. The sanction and approval of two or more Treasury Commissioners, by warrant under their hands, is required before the powers conferred by the Duchy of Cornwall Management Act, 1863, can legally be exercised in respect of sales, disposals, enfranchisements, charges, or arrangements by way of compromise, of, upon, or concerning Duchy possessions; repurchases, or redemptions of an annual sum reserved or made payable on any such sale, disposal, or enfranchisement; purchases, except where the consideration does not exceed £500; and the application of capital moneys for improvements (*r*).

This sanction and approval may be given either for any particular class of cases, or for any particular case, and either with or without conditions or restrictions, as the Commissioners, or any two of them, think fit (*s*).

(3) *Sales, Enfranchisements, and Purchases of Lands.*

Power to alienate Duchy land.

526. Subject to the previous sanction of two or more Treasury Commissioners given by warrant under their hands (*t*), the Duke of Cornwall (*u*) may dispose by way of absolute sale, enfranchisement of copyhold or customary tenements (*x*), or disposition for a limited period, to any person (*y*), of any part of the possessions (*a*)

(*p*) The Stannaries Court (Abolition) Act, 1896 (59 & 60 Vict. c. 45), s. 1, and Order of the Lord Chancellor 16th December, 1896.

(*q*) 1 & 2 Vict. c. 101, s. 2.

(*r*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 11.

(*s*) *Ibid.*

(*t*) See *supra*. Purchasers are not bound to see that this sanction has been obtained (see pp. 243, 251, *post*).

(*u*) In the Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 37, "Duke of Cornwall" includes all succeeding dukes, and the Sovereign for the time being whilst the possessions of the Duchy are vested in him. As to the vesting of the Duchy when there is no heir apparent, see p. 239, *ante*.

(*x*) This power of enfranchisement extends to copyholds held for life or lives, and authorises the conveyance of the freehold of the same (Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 3).

(*y*) "Person" in the Act includes a body politic, corporate, or collegiate, and every other corporation sole or aggregate (Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 37).

(*a*) The term "possessions" in the Act when applied to the Duchy includes regalities, hundreds, castles, honours, lordships, manors, advowsons, forests, chases, woods, parks, messuages, lands, buildings, rights of common, mines, minerals, rights of entry or other rights in respect of mines or minerals, rent-charges in lieu of tithes, fixtures, services, rents, pensions, annuities, annual

of the Duchy, subject to any reservations, exceptions, and restrictions (*b*).

Consideration.

527. The consideration for the disposition may be either a gross or an annual sum of money, or partly a gross and partly an annual sum, and where it consists wholly or in part of an annual sum, the same in the case of an absolute alienation in fee must be perpetual, and in the case of an alienation for a limited period must be payable during the continuance of the estate or interest parted with, the annual sum to be issuing and payable out of and to be charged upon the possessions disposed of or enfranchised. The annual sum may be made subject to repurchase or redemption at such time and for such gross sum as may seem expedient. The circumstances attending any disputed rights or claim and the outlay, if any, previously made in reclaiming, building upon, inclosing, or otherwise improving the premises may be taken into account in determining the consideration, and a fair and reasonable allowance may be made in respect of the same (*c*).

The amount of the consideration for the sale, disposal, or enfranchisement, if wholly or in part a gross sum, must be paid into the Bank of England, and must be received by the cashiers of the Bank upon the production of any note signed by the Keeper of the Records of the Duchy or his deputy specifying the sum to be paid, and that it is to be paid to the account of the Duchy. The cashiers must carry in the sum so paid to the account of the Duchy (*d*), and give a receipt without fee or reward (*e*).

If the consideration is wholly or in part an annual sum, it is to be dealt with as part of the revenues of the Duchy. But in the case of repurchase or redemption the gross sum is to be paid into the Bank of England and dealt with as in the case of gross sums paid in the first instance (*f*).

Persons paying money upon sales, disposals, or enfranchisements, are not bound to see to the application or answerable for the misapplication or non-application of the money paid (*g*).

Assurances.

528. The assurances effecting sales, enfranchisements, or disposals so authorised must be by deed under the Duchy seal, and where the consideration is wholly or in part a gross sum of money, a memorandum must be indorsed thereon signed by the auditor of the Duchy acknowledging that the amount has been paid into the

sums reserved on any sale, disposal, or enfranchisement made under the powers of the Act, rights, privileges, easements, possessions, tenements, and hereditaments whatsoever, whether in possession or reversion, parcel or reputed or claimed to be parcel of the Duchy of Cornwall, or annexed to the same.

(*b*) Duchy of Cornwall Management Acts, 1863 (26 & 27 Vict. c. 49), ss. 3, 11, and 1893 (56 & 57 Vict. c. 20), s. 1.

(*c*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 3.

(*d*) Such an account is required to be opened by the Governor and Company of the Bank (*ibid.*, s. 4).

(*e*) *Ibid.*

(*f*) *Ibid.*

(*g*) *Ibid.*, s. 20. If the instrument purports to be made under the authority of the Act, purchasers are not bound to inquire whether the provisions of the Act have been complied with (*ibid.*, s. 19; and see p. 251, *post*).

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Bank of England in the manner directed, and specifying the date of payment. The assurance may be in the form provided or any other more convenient form (*h*).

Annuities and rents.

529. Where the consideration for the sale, disposal, or enfranchisement consists wholly or in part of an annual sum of money, either perpetual or for a limited period, the same powers of recovery may be exercised by the Duke of Cornwall as if it were a rent service reserved on a lease of the possessions out of which it is made payable (*i*).

With the previous sanction of two or more Treasury Commissioners, signified by warrant under their hands, annual sums reserved on sales, disposals, or enfranchisements under the above powers, or any part of the same, may be repurchased or redeemed, and the whole or a proportionate part of the hereditaments chargeable may be released by deed under the Duchy seal from all future payments of the sum redeemed, and from all claims and demands in respect of the same (*k*).

Copyholds.

530. Licences may be granted by the Duke of Cornwall (or by the steward of the manor of which the premises are parcel according to the custom of the manor relating to licences to demise) to any copyhold or customary tenant of any messuages, lands, or tenements held of any manor being parcel of the possessions of the Duchy authorising the tenant to build on or otherwise improve all or any part of his tenement, and to do certain specified things (*l*), or to demise all or any part of the tenement for any term or number of years not exceeding twenty-one years, or, for building, rebuilding, or repairing purposes, for any term of years not exceeding ninety-nine years from the time of granting the licence (*m*).

In every such licence the sum to be considered as the annual value for assessing the prices payable to the Duke upon the admission of any new tenant to any tenement built on or improved, or licensed for building on or improving, must be expressed and fixed according to the prescribed conditions (*n*); and no fine, premium, or fore-

(*h*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 5. After enrolment (see p. 254, *post*) the deed is valid and effectual as against the Duke of Cornwall (including all succeeding Dukes and Sovereigns; see note (*u*), p. 242, *ante*), and vests the property in the grantee according to its tenor, and is an effectual discharge for the consideration money expressed to have been paid (*ibid.*). The form is given in the schedule to the Act.

(*i*) *Ibid.*, s. 6.

(*k*) *Ibid.*, ss. 6, 11. The person repurchasing or redeeming is not bound to see that the sanction of the Treasury has been obtained (see p. 251, *post*).

(*l*) Namely, to make roads and streets in, upon, or through the same, and to annex the same, or any part, to adjacent ground for the purpose of improvement, and to pull down any messuages or erections which may be standing or be on the tenement or any part of the same.

(*m*) Statute 7 & 8 Vict. c. 65, s. 25, extended as to the words in brackets by the Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 35, which also provides that the express power conferred by the former Act is not to diminish or affect the power previously sanctioned by the custom of the manor.

(*n*) Namely, so that the sum to be fixed is not less in any case than the best annual rent which might be obtained at the date of the licence on a demise for

gift may be taken for the granting of the licence except the customary annual fine, if any, for every year of the term expressed in the licence, and the fees usual or reasonable in that behalf.

There must also be reserved by the licence to the Duke of Cornwall all fines, heriots, rents, customs, and services due and to grow due in respect of the tenements for which the licence is granted (*o*).

Licences so granted must be entered on the court rolls or court books of the manor of which the tenement is held (*p*). They may be made without the previous sanction of the Treasury (*q*).

Grants for churches, chapels etc.

531. Subject to certain restrictions as to extent and value, the Duke of Cornwall may by deed under the Duchy seal make grants out of the lands and possessions of the Duchy for the purposes of: (1) Any building proper to be used as or converted into a church, chapel, or school for the education of poor persons; (2) any ground proper for the site of any church or chapel, with or without a cemetery or burial ground thereto; (3) any ground proper for a cemetery or burial ground to any church or chapel; (4) any house with its appurtenances, and with or without a garden, proper for the residence of the spiritual person who may serve any church or chapel, or of the master or mistress of any such school; (5) any ground proper for the site of any such residence or school; (6) any building or site for a building solely for the celebration of divine service by any denomination of nonconforming Christians, so that the denomination is specified in the grant (*r*).

For any one of these purposes not more than one acre or premises of greater value than £200 may be granted in any particular parish or place. But this restriction does not apply where the excess in value over £200 is paid into the Bank of England, as in the case of a sale for a gross sum (*s*), or where the excess is compensated for by an annual sum reserved on the grant and made payable to the Duke as part of the revenues of the Duchy (*t*).

Effect of grant.

532. Such grants may be made to any person or body politic or corporate, and when enrolled in the office of the Duchy (*a*) are valid against the Duke of Cornwall, and vest the property in the grantees, who, together with their representatives, are to be deemed to be in the actual seisin and possession of the premises by force of

a term of ninety-nine years, or for the shorter term expressed in the licence, without taking any fine, premium, or foregift for the demise, and so that the sum so fixed shall not be considered as the annual value according to which the fine is to be assessed for more than ninety-nine years from the date of the licence or such shorter term as is expressed in the licence.

(*o*) Statute 7 & 8 Vict. c. 65, s. 25.

(*p*) *Ibid.*

(*q*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 35.

(*r*) *Ibid.*, s. 36.

(*s*) See p. 243, *ante*.

(*t*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 36. In estimating the value no account is to be taken of the value of any building, the cost of which has been defrayed by public subscription, or which has been previously erected solely with the view of being used for the purpose to which it is proposed to be devoted by the grant (*ibid.*).

(*a*) See p. 254, *post*.

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the Duchy of Cornwall Management Act, 1863, with full capacity to hold and enjoy the same in all respects according to the tenor of the deed. But in the case of a free grant, where the property ceases to be used for the purpose for which it was granted, or is used for any other purpose, the same, if unconsecrated, is to revert to and again become parcel of the Duchy as if no grant had been made (*b*).

Power to purchase land.

533. With the previous consent of two or more Treasury Commissioners, signified by warrant under their hands (*c*), or without such previous sanction where the consideration does not exceed £500, the Duke of Cornwall may purchase any manors, lordships, advowsons, messuages, lands, mines, minerals (*d*), tenements, or hereditaments in England in fee simple, or any copyhold lands or tenements of inheritance, the freehold of which is parcel of the possessions of the Duchy, or any rents, pensions, annuities, rights of common or mining, or other charges or rights (*e*).

The property so purchased must be conveyed, released, or surrendered to the Duke of Cornwall in the form provided (*f*), or in any more convenient form, and where not extinguished by the conveyance, release, or surrender, it becomes part and parcel of the possessions of the Duchy, and subject to the same limitations, provisions, powers, and authorities in every respect (*g*).

Extinguishing outstanding interests.

534. With the previous sanction of the Treasury (*h*), any leasehold, copyhold, customary, or other outstanding interest in any of the possessions of the Duchy may be extinguished or surrendered, and the Duke of Cornwall may grant to the person entitled to the estate so extinguished and his representatives an annuity or yearly sum payable during the period for which the estate or interest would otherwise have continued, or any other period deemed expedient, and chargeable upon the possessions in which the estate or interest existed. Such an arrangement must be by deed under the Duchy seal, and may be in the form provided, or any other more convenient form (*i*).

The same remedies may be exercised by the grantee of such an annual sum, or his representatives, for recovering and enforcing payment of the same by distress and entry on the hereditaments

(*b*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 36. Concurrent powers of making these grants are conferred by statute 7 & 8 Vict. c. 65, s. 26, but no grant is to be made thereunder contrary to the provisions set out in the text (Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 36.)

(*c*) See p. 243, *ante*. The vendor is not bound to see that this sanction has been obtained. See p. 251, *post*.

(*d*) Under the Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), "minerals" includes all minerals, whether metallic or not, stone, and substrata of every description (Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 37).

(*e*) *Ibid.*, ss. 7, 11.

(*f*) By the schedule to the Act.

(*g*) *Ibid.*, s. 7.

(*h*) See p. 243, *ante*. The person surrendering is not bound to see that the provisions of the Act are complied with; see p. 251, *post*.

(*i*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 9. The form is given in the schedule to the Act.

charged, as in the case of a rent service reserved upon an ordinary demise. But no right of action against the Duke of Cornwall accrues by reason of the non-payment of the annual sum (*j*).

(4) *Arrangement of Disputes.*

Arrangement of disputes.

535. With the previous sanction of the Treasury (*k*), any arrangement considered expedient for the settlement of questions concerning property or rights connected with the Duchy (*l*) may be made by the Duke of Cornwall, who is empowered for that purpose by deed under the Duchy seal, in any form which may be deemed expedient, to give up or relinquish or admit the title to any such property or right, and in case of any such relinquishment or admission to accept any land, tenements, or hereditaments, or any sum of money in lieu of or by way of consideration for the same, and to authorise the payment to any person of any rents or other profits to be derived from, or any purchase-moneys to be received on account of, the sale of any such property or right (*m*).

The agreement may be made with any person claiming to be entitled in possession for life or any greater estate, either at law or in equity, to the rents and profits, interest or income, or the use and enjoyment of the property or right, and after enrolment (*n*) is binding and conclusive on the Dukes of Cornwall and every party interested or claiming to be interested in the subject-matter.

Any land, hereditaments, or money accepted by the Duke under the agreement must be treated as property purchased or as money arising from a sale for a gross sum of the Duchy possessions under the Duchy of Cornwall Management Act, 1863 (*o*).

Arbitration.

536. In case of any difference as to the terms of such an arrangement, the Duke of Cornwall, with the previous sanction of the Treasury (*p*), may authorise an agreement for reference of the matter to the arbitration and umpirage of one or more persons upon any terms deemed advisable. When enrolled (*q*), the award made upon the reference is binding and conclusive upon the Duke of Cornwall and all other parties to the reference and their representatives (*r*).

(*j*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 9. The form is given in the schedule to the Act.

(*k*) See p. 243, *ante*. Persons claiming under any instrument are not bound to see that this or any other provision of the Act has been complied with (see p. 251, *post*).

(*l*) Namely, questions concerning the boundary or extent of any of the Duchy possessions, or the title to any property, right of common, right of way, water right, or other right whatsoever being or reputed or claimed to be parcel of or appurtenant to the Duchy possessions, or of or to any right exercised or claimed to be exercised in, over, or upon any part of the possessions or reputed possessions of the Duchy, or touching or concerning any other matter having relation to or affecting the same.

(*m*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 10.

(*n*) See p. 254, *post*.

(*o*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 10.

(*p*) See p. 243, *ante*.

(*q*) See p. 254, *post*.

(*r*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 18.

SECT. 4.

(5) *Application of Capital Moneys.*

Revenues of Hereditary Nature retained by the Crown.

Payment of expenses and purchase-moneys.

537. All gross sums of money received in respect of sales, disposals, or enfranchisements (*s*) of the Duchy possessions under the Duchy of Cornwall Management Act, 1863, are directed to be applied in the payment of expenses of the Duke of Cornwall in relation thereto, and of the purchase-moneys of any property or rights purchased under the authority of the Act (*t*), and the expenses of such purchases (*a*).

Redemption of land tax.

538. The gross sums so received are also to be applied in the redemption of land tax and the expenses attending the same; and all contracts for redemption may be entered into by the Lord Warden of the Stannaries in Cornwall and Devon, or any other person nominated for that purpose by the Duke of Cornwall by sign manual warrant or otherwise (*b*).

(*s*) See 242, *ante*.

(*t*) See p. 246, *ante*.

(*a*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 8.

(*b*) *Ibid.* Concurrent powers for the redemption of land tax are also conferred by the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), ss. 143—149, as follows:—The surveyor-general of the Duchy may, with the special warrant of any three or more of the council or commissioners of the revenues of the Duchy (see p. 241, *ante*), contract with any person or body politic or corporate for the sale at the best price procurable of so much of the hereditaments of the Duchy as may be sufficient for the redemption of land tax charged upon the Duchy, the purchase-money therefor to be paid by the purchaser into the Bank of England, at which an account is required to be opened, entitled "the account of the Duchy of Cornwall," to which such moneys are to be carried. After entering into a contract for sale the surveyor-general is to grant to the purchaser a certificate under his hand specifying the premises contracted for and the amount of the purchase-money. Upon production of this certificate the cashiers at the Bank must accept the purchase-money specified, and without fee or reward acknowledge the receipt at the foot or on the back of the certificate, which must afterwards be brought to the office of the auditor of the Duchy and enrolled in proper books kept for the purpose, separate from the other business of the office. Having enrolled the certificate and receipt, the auditor or his deputy must attest the same under his hand and return it to the purchaser, and as from enrolment the property purchased is to be deemed to be in the actual seisin and possession of the purchaser, to hold and enjoy peaceably and quietly and as fully in all respects as the Duke of Cornwall might have held or enjoyed the same. If the purchaser neglects to procure and sue forth the certificate, or to pay the purchase-money into the Bank, or to enrol the certificate and cashier's receipts, for the space of forty days computed from the day on which the contract was made, the contract is to be null and void, and the purchase-money, if paid into the Bank, forfeited, unless the surveyor-general makes an order for *nunc pro tunc* enrolment, which he is authorised to do upon cause being shown. Provision is also made for lost or destroyed certificates and mistakes as to enrolment etc. (see this note, *infra*). The money so paid into the Bank is directed to be laid out by order of the commissioners of the Duke of Cornwall in Bank annuities in the name of the Duke, and the Bank is required to permit transfers and acceptances of the annuities to be made in the name of the Duke by the receiver-general of the Duchy, who is required to accept the transfers. The dividends of the annuities are to be applied as revenue of the Duchy. This provision as to investment is now, it seems, partly obsolete, since payment for redemption of land tax may now be made by any owner to the Commissioners of Inland Revenue by a capital sum equal to thirty times the sum assessed for land tax, under the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 32. Under s. 148 of the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116),

SECT. 4. Revenues of Hereditary Nature retained by the Crown.

Improvements.

539. With the previous sanction of the Treasury (*c*), any part of the gross sums received as above may be advanced and applied in permanently improving the Duchy possessions by inclosure, erecting buildings, or executing drainage or other works thereupon (*d*); or in the improvement of the house property of the Duchy and purposes connected therewith, including the laying out and forming of new roads, streets, sewers, or drains, and (where required for effecting any of the latter class of improvements) the purchase of any lease or leases in existence of any parts of the property intended to be improved (*e*).

Sums so advanced for improvements are to be a charge upon and repaid from the revenues of the Duchy to the account of the Duchy at the Bank of England by annual instalments, in the case of improvements of the former class, of not less than one-thirtieth part in every year (*f*), and in the case of improvements of the latter class, of such amount, not being less than one-sixtieth part in every year, as the Treasury direct (*g*). The receiver-general of the Duchy is required to see that the annual instalments are paid, and they are applicable as moneys arising from sales of the Duchy possessions under the Duchy of Cornwall Management Act, 1863 (*h*).

payment for redemption was to be made in the case of Duchy lands by transfer of the Bank annuities to the Commissioners of the National Debt; but this provision is repealed by the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 40, Schedule. Upon redemption, and registration of the same in the manner directed by the Act, the lands are to be freed and exonerated from the tax during the continuance of any demise, and the tax is to be recoverable as rent during such period by the Duke against any lessee or tenant, and by such lessee or tenant against under-lessees or under-tenants.

By the statute 5 Geo. 4, c. 78, s. 8, in the case of certificates granted prior to the 17th June, 1824, when the purchase-money has been paid into the Bank of England as above, and it is shown to the satisfaction of the surveyor-general of the Duchy that his certificate has been lost or destroyed by accident, the latter may grant a fresh certificate of the same tenor and according to the form and date prescribed as above, and order a receipt for the purchase-moneys to be indorsed thereon and signed with the name of the cashier (living or dead) who received the original purchase-money, and also order the fresh receipt and certificate to be enrolled in the office of the Duchy. And in every other case where, by neglect or omission, any error or mistake has been made at the Bank of England or in the Duchy office touching any certificate granted prior to the 17th June, 1824, or any receipt for the consideration money, or enrolment of the same or otherwise, the surveyor-general is required to cause the mistake to be rectified, and all such contracts are to be valid and effectual from the granting of the fresh certificate or the amendment of the mistake, and the property conveyed vested as if no such mistake had been made, and all conveyances, assurances, charges, and devises made subsequently to such contracts, and depending as to title on the due enrolment of the certificate and receipt, are to be of the same effect as if the latter had been originally duly enrolled.

(*c*) See p. 243, *ante*.

(*d*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 8, as amended by the Duchy of Cornwall Management Act, 1868 (31 & 32 Vict. c. 35), s. 1.

(*e*) Duchy of Cornwall Management Act, 1868 (31 & 32 Vict. c. 35), s. 2.

(*f*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 8.

(*g*) Duchy of Cornwall Management Act, 1868 (31 & 32 Vict. c. 35), s. 2.

(*h*) 26 & 27 Vict. c. 49, s. 8. See *supra*, and p. 248, *ante*.

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Revenues of Hereditary Nature retained by the Crown.

540. Payments out of moneys paid into the Bank of England to the account of the Duchy under the Duchy of Cornwall Management Act, 1863, must be made by draft under the hands of three of the councillors or regular officers of the Duchy authorised by the Duke of Cornwall by sign manual warrant, and drafts so drawn are sufficient authority to the Bank to pay the amount specified to the person, or to the order of the person named, or to the bearer (*i*).

Authorisation of payments.

Investment.

541. Moneys received in respect of sales, disposals, or enfranchisements (*k*), and not immediately required for the purposes to which they are made applicable, may be laid out in the meantime in the purchase of Bank annuities, or in any investments authorised by s. 3 of the Trust Investment Act, 1889 (*l*), in the name or to the account of the Duchy of Cornwall. The Governor and Company of the Bank are authorised and required to permit transfers of the annuities to be made in that name or to that account, and such transfers may be accepted by some officer of the Duchy or other person authorised by the Duke of Cornwall (*m*).

Present or future investments so made may be varied for any of the investments authorised (*n*).

Sale of investments.

542. The stock or other securities purchased in the name of the Duchy may be sold by the direction of the Duke of Cornwall, when it is deemed necessary, and the moneys produced paid into the Bank of England, to the credit of the Duchy, to be applied in the same manner in all respects (*o*) as money received in respect of a sale for

(*i*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 12.

(*k*) See p. 242, *ante*.

(*l*) 52 & 53 Vict. c. 32, or any Act amending or extending the same. This section was repealed (except as to Scotland), and powers of investment substituted in the case of trustees, implied or constructive (except mortgagees), by the Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 1, 50, 51, Schedule. S. 3 of the Trust Investment Act, 1889 (52 & 53 Vict. c. 32), being virtually incorporated with the Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), under the provision in the text, would appear to be still applicable to investments of Duchy moneys.

(*m*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 13, extended to include investments under the Trust Investment Act, 1889 (52 & 53 Vict. c. 32), by the Duchy of Cornwall Management Act, 1893 (56 & 57 Vict. c. 20), s. 2 Moneys which at the passing of the Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49) (namely, 13th July, 1863), were standing or payable to the credit of the account, or which may be received upon sales of Duchy lands under other Acts, are to be considered as part of the fund arising from sales etc. under the Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), and placed to the credit of the Duchy account at the Bank and dealt with accordingly. All Bank annuities at a similar date standing in the name of the Duke of Cornwall in the books of the Bank were also directed to be considered as having been purchased with moneys arising from sales under the Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), and transferred to the Duchy account and dealt with accordingly (Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 17). Orders or letters of attorney required by the Bank for effecting any such carrying over or transfer are to be under the hands of three persons authorised to sign drafts as mentioned in the text above.

(*n*) Duchy of Cornwall Management Act, 1893 (56 & 57 Vict. c. 20), s. 2.

(*o*) As to the powers of application, see pp. 248, 249, *ante*.

a gross sum of money (*p*) under the authority of the Duchy of Cornwall Management Act, 1863. The transfer of the stock or securities may be effected by any person appointed by letter of attorney under the hands and seals of any three persons authorised to sign drafts for payments out of the Bank of England (*q*), and the Governor and Company of the Bank must permit the transfers to be made, and are exonerated and precluded from seeing or inquiring whether the sale is for the purposes and in pursuance of the powers conferred (*r*).

Dividends.

543. The dividends on stocks and securities purchased must be paid by the Bank of England to the receiver-general of the Duchy or his deputy or lawfully authorised attorneys, to be accounted for and applied in all respects as part of the revenues of the Duchy (*s*).

Protection of purchasers etc.

544. No person claiming under any deed or instrument made or purporting to be made under the above powers conferred by the Duchy of Cornwall Management Act, 1863, is bound to inquire whether the transaction is in fact authorised by the Act or not, or whether it is or is not within the provisions and the true intent and meaning of the Act; but all such instruments when enrolled (*t*) are valid and effectual as against the Duke of Cornwall for the purposes for which they were executed (*a*).

No person paying any sum of money under the authority or supposed authority of the Duchy of Cornwall Management Act, 1863, or in pursuance or purported pursuance of any of its provisions, is bound to see to the application or answerable for the misapplication or non-application of the money so paid (*b*).

(6) *Leases of Duchy Lands.*

Power to lease.

545. Leases for any term of years not exceeding thirty-one years (*c*) in possession, but not in reversion, may be granted by the Duke of Cornwall under the Duchy seal of any manors, messuages, parks, lands, or hereditaments for the time being parcel of the possessions of the Duchy, including mines and quarries, whether opened or not, with power to the grantee to work, get, carry away, and dispose of the minerals, and to do all acts necessary or expedient for working, getting, carrying away, and disposing of the same (*d*).

(*p*) See p. 243, *ante*, as to sales.
(*q*) See p. 251, *ante*.
(*r*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), ss. 15, 16.
(*s*) *Ibid.*, s. 14.
(*t*) As to enrolment, see p. 254, *post*.
(*a*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 19. This provision applies only to the preceding portions of the Act (namely, the provisions stated in the text above), and does not therefore apply to the powers of leasing etc. which come after.
(*b*) *Ibid.*, s. 20. This provision applies to all payments under the Act without restriction.
(*c*) See the provision as to leases for lives, p. 252, *post*.
(*d*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 21. By statute 7 & 8 Vict. c. 65, s. 43, no licence, grant, or leave to search for, work,

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546. The rent reserved in such leases (other than of mines and minerals) must be the full and fair annual rent of the property without taking any fine or consideration in the nature of a fine (except as previously mentioned (*e*)), and be incident to the immediate reversion.

Rents.

In the case of a demise or grant of mines or minerals a reasonable amount of rent, royalty, dues, toll, or dish must be reserved without taking any fine or consideration in the nature of a fine (*f*), except in the cases previously mentioned (*g*).

Building leases.

547. Leases for any term of years in possession, but not in reversion, may be granted by the Duke under the Duchy seal of any lands or hereditaments for the time being parcel of the possessions of the Duchy, with a view to the improvement of the same by the erection of new buildings or the repair of existing buildings thereon, or, in the case of open or unimproved or waste lands, by the inclosure or cultivation of the same or otherwise (*h*).

In these leases a fair annual rent, incident to the immediate reversion, must be reserved, without taking any fine or consideration in the nature of a fine (except as previously mentioned (*i*)). The lease must also contain a covenant by the lessee for the execution of the particular improvements in consideration of which it is made (*k*).

Restrictions.

548. Leases of any part of the possessions of the Duchy may not be granted by the Duke of Cornwall for the life or lives, or for any term of years determinable with the life or lives, of any person or persons other than those for whose life or lives some adjacent lands, parcel of the Duchy, were held on the 13th July, 1863, and then not for any longer term than thirty-one years, determinable with such life or lives (*l*).

Surrenders.

549. New leases may be granted of any part of the possessions of the Duchy in consideration of the surrender of any outstanding estate held for life or any term of years, either absolute or determinable with any life or lives. The value of the interest surrendered may be taken into account in determining the rent to be reserved in the new lease, and the acceptance of the surrender is not to be considered as the taking of a fine (*m*).

or get mines, minerals, stone, or substrata, belonging to the Duchy, for a period not exceeding one year from the date of the same, is to be subject to any stamp duty.

(*e*) See note (*g*), *infra*.

(*f*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 21. "Dish" is a proportion of tin or lead ore paid as royalty.

(*g*) The restriction on taking fines does not apply to affect the disposals for a limited period in consideration wholly or in part of a gross sum of money, and made with the sanction of the Treasury (*ibid.*, s. 23; and as to the disposals in question, see p. 242, *ante*).

(*h*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 22, as amended by the Duchy of Cornwall Management Act, 1893 (56 & 57 Vict. c. 20), s. 1.

(*i*) See note (*g*), *supra*.

(*k*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 22.

(*l*) *Ibid.*, s. 25.

(*m*) *Ibid.*, s. 26.

Surrenders of any lease of Duchy possessions may also be accepted by the Duke of Cornwall, and separate leases of the whole or any part of the hereditaments surrendered granted under the Duchy seal for the residue of the term under the surrendered lease, and the rent reserved by the latter may be apportioned (*n*).

New leases granted upon the surrender of an existing lease are effectual notwithstanding any underlease may not be surrendered (*o*).

Protection of lessees.

550. Where any part of the Duchy property comprised in any lease is sold, disposed of, or granted, all rights under covenants, powers of re-entry, and other powers and conditions of the lease remain in full force with regard to the residue of the property comprised in the lease, and are not prejudicially affected by the severance of the reversion although no apportionment of the rent reserved by the lease is made (*p*).

The covenants, conditions, and agreements contained in any lease or grant made under the powers conferred by the Duchy of Cornwall Management Act, 1863, are to be as good and effectual in law, according to their tenor, as if the Duke of Cornwall were seised of an absolute estate in fee simple of the hereditaments granted (*q*).

Special leasing powers.

551. Certain powers of leasing Duchy lands may be exercised under the Military Lands Act, 1892 (*r*).

Special powers of granting leases of certain lands and premises situate in the parish of Lambeth, in the county of Surrey, and forming parcel of the Duchy, are conferred upon the Duke of Cornwall and his successors (*s*).

Small holdings and allotments.

552. For the purposes of small holdings and allotments, leases of Duchy lands may be granted to a council (*t*) by the Duke of Cornwall, or other the persons for the time being having power to dispose of land belonging to the Duchy (*a*), for a term not exceeding thirty-five years, either with or without such right of renewal for not less than fourteen or more than thirty-five years as

(*n*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 27.

(*o*) *Ibid.*, s. 28, which enacts that such new leases are to be taken as renewals under the Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 6.

(*p*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 29.

(*q*) *Ibid.*, s. 24.

(*r*) 55 & 56 Vict. c. 43, s. 10 (1). See p. 201, *ante*.

(*s*) Under the statute 52 Geo. 3, c. 123. The powers as to leases conferred by this Act relate to the granting of leases under contracts entered into under the powers conferred by the statute 50 Geo. 3, c. 6, which do not appear to extend to future Dukes of Cornwall, though the latter are bound by contracts and leases entered into thereunder (statutes 50 Geo. 3, c. 6, s. 1; 52 Geo. 3, c. 123, ss. 1, 2). The last-mentioned Act also confers powers upon the Duke of Cornwall and his successors, with the advice and consent of his council or commissioners of revenue, to set apart land for streets, roads etc., to make sewers, drains, docks etc. (statute 52 Geo. 3, c. 123, ss. 6, 7), with a saving of the rights of the Commissioners of Sewers and of the city of London (*ibid.*, ss. 8, 10).

(*t*) "Council" under the Act may be either the county, borough, district, or parish council, according to the provisions of the Act which are applicable.

(*a*) See, as to these, p. 240, *ante*.

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is conferred by the Act in the case of land hired compulsorily for those purposes (*b*).

(7) *Enrolment.*

Deeds must be enrolled.

553. All deeds and instruments by which any property (*c*) is purchased or any of the possessions of the Duchy sold, disposed of, enfranchised, exchanged, leased, licensed to be demised, granted, charged, or released, and all agreements for reference or submission to arbitration, and any award made under reference or submission to arbitration under the powers of the Duchy of Cornwall Management Act, 1863, must be enrolled in the office of the Duchy of Cornwall within six months after the date of the same (*d*). The enrolment must be made by the Keeper of the Records of the Duchy in order of time as the instruments are brought to the office, and a certificate under his hand, or the hand of his deputy, indorsed upon the same of the fact and date of enrolment (*e*).

In cases where the enrolment of the instrument in the Duchy office is or has been omitted or delayed beyond the period provided as above, or otherwise, the Duke of Cornwall, or any person appointed by him by sign manual warrant, or, in the absence of such appointment, the Keeper of the Records of the Duchy, upon reasonable cause shown for the omission or delay, may direct or permit the making of the enrolment *nunc pro tunc* (*f*).

Effect of enrolment.

554. Enrolment is to have the like force and effect in all respects as enrolment or registration in the High Court of Justice (*g*), and the memorandum of enrolment written on the instrument and purporting to be signed by the Keeper of the Records of the Duchy or his deputy is evidence that the same has been enrolled according to the tenor of the memorandum and to the statutory provisions (*h*).

Proving documents.

555. As to deeds, certificates, receipts, or other instruments relating to the possessions of the Duchy, and enrolled in the Duchy office, the enrolment in the books of the office, or an examined copy of the enrolment, or a certificate purporting to set forth a true copy of the whole or part of the same, and purporting to be signed and certified by the Keeper of the Records of the Duchy, is, in the absence of evidence to the contrary, and without the production

(*b*) Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), s. 40 (1), (2). This provision is made subject to any consents and conditions required, if any (see *ibid.*, s. 40 (1)). As to the renewal of leases of land hired compulsorily, see *ibid.*, s. 44. See titles ALLOTMENTS, Vol. I., p. 331 ; SMALL HOLDINGS. As to agricultural holdings generally, see title AGRICULTURE, Vol. I., p. 237.

(*c*) Namely, manors, lordships, messuages, lands, mines, minerals, tenements, hereditaments, rents, pensions, annuities, rights of common or mining, or other charges or rights.

(*d*) See the text *infra* as to *nunc pro tunc* enrolments.

(*e*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), ss. 30, 31.

(*f*) *Ibid.*, s. 33. When made, the enrolment is to be as valid and effectual as if made within the period limited by the Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), or otherwise (*ibid.*).

(*g*) High Court of Chancery or any of the courts at Westminster, in the Act ; now the Central Office of the High Court (see R. S. C., 1883, Ord. 61, r. 9).

(*h*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 32.

of the original or the calling of any attesting witness, and, in the case of a certificate without proof, other than the production of the same, that the copy is a true copy, to be admitted in all courts of justice and in all legal proceedings as proof of the original instrument or enrolment, or of so much of the same as the certified copy purports to set forth, and as proof that the original was duly made, given, or executed by the parties (*i*).

(8) *Application of certain General Acts.*

Agricultural Holdings Act, 1908.

556. The Agricultural Holdings Act, 1908 (*k*), applies to land belonging to the Duchy of Cornwall, and with respect thereto such person as the Duke of Cornwall or the possessor for the time being of the Duchy (*l*) appoints is to represent the Duke of Cornwall or other possessor, and to be deemed the landlord, with power to do any act or thing which a landlord is authorised or required to do under the Act (*m*).

Compensation under the Act payable by the Duke of Cornwall, or other possessor of the Duchy (*n*), in respect of an improvement comprised in Part I. or Part II. of the First Schedule to the Act (*o*), is to be paid, and advances therefor made, in the manner and subject to certain provisions (*p*) of the Duchy of Cornwall Management Act, 1863, with respect to improvements of land mentioned therein (*q*). This provision also applies, in certain cases relating to market gardens (*r*), to any improvement comprised in the Third Schedule to the Agricultural Holdings Act, 1908, compensation in respect of which in such cases is to be paid in the same manner, and out of the same funds, as if it were comprised in Part I. of the First Schedule to the Agricultural Holdings Act, 1908 (*s*).

Copyhold Act, 1841.

557. Certain provisions of the Copyhold Act, 1841 (*t*), are extended and made applicable to lands and possessions in the Duchy of Cornwall, and to any enfranchisement of lands held of the Duchy manors under the powers of any existing Acts

(*i*) Assessionable Manors Award Act, 1848 (11 & 12 Vict. c. 83), s. 6.
(*k*) 8 Edw. 7, c. 28.
(*l*) See, as to who is entitled to possession of the Duchy, pp. 238 *et seq.*, *ante*.
(*m*) Agricultural Holdings Act, 1908 (8 Edw. 7. c. 28), s. 39 (1), (2).
(*n*) See pp. 238 *et seq.*, *ante*.
(*o*) See p. 191, *ante*.
(*p*) Namely, those comprised in the Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 8, as to which see p. 249, *ante*.
(*q*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 39 (3).
(*r*) Namely, in the case of holdings in respect of which it is agreed in writing on or after the 1st January, 1896, that the holding shall be let or treated as a market garden.
(*s*) 8 Edw. 7, c. 28, s. 42 (1) (b).
(*t*) 4 & 5 Vict. c. 35. This Act was repealed by the Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 100, certain of the provisions of the latter Act being extended to manors and lands vested in the Sovereign in right of the Crown or of the Duchy of Lancaster (*ibid.*, s. 98, and see pp. 195 *et seq.*, 226, *ante*), but not to the Duchy of Cornwall. It seems, therefore, that the Copyhold Act, 1841 (4 & 5 Vict. c. 35), is still applicable to the latter, since the provisions of a repealed Act, in so far as they are incorporated in an unrepealed Act, remain in force notwithstanding the repeal. See title STATUTES.

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of Parliament (*a*), and to the stewards and tenants of Duchy manors (*b*).

558. Land forming part of the possessions of the Duchy not exceeding in the whole one acre in any one parish (*c*) may be granted, conveyed, or enfranchised by deed to, or in favour of, any existing or intended institution to which the Literary and Scientific Institutions Act, 1854, applies. The grant is to be made by three or more of the principal officers of the Duchy, if so authorised (*d*), and may be in the form provided (*e*), or as near thereto as circumstances will admit, and upon such terms and conditions as may seem fit (*f*).

Literary and Scientific Institutions Act, 1854.

The like provision is made in the event of land so granted by way of gift ceasing to be used for the purposes of the institution, as in the case of the Duchy of Lancaster (*g*).

Inclosure Acts.

559. Powers vested in the Board of Agriculture and Fisheries by the Inclosure Acts for effecting exchanges of land are as from the 13th July, 1863, with regard to any exchange affecting the possessions of the Duchy of Cornwall, to be deemed and construed to authorise a dealing, for the purpose of the exchange, with mines and minerals (*h*), and rights in respect of mines and minerals, either with or without any dealing with the ownership of the surface (*i*).

(*a*) Namely, when the Assessionable Manors Award Act, 1848 (11 & 12 Vict. c. 83), was passed (31st August, 1848). *Quære*, therefore, whether the provisions apply to enfranchisements under the Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49).

(*b*) Assessionable Manors Award Act, 1848 (11 & 12 Vict. c. 83), s. 5. The provisions so extended are—(1) for enabling tenants to grant rights of way, entry, and other easements to the lord of the manor for mining purposes; (2) for the partition of copyhold or customary lands by courts of equity; (3) for enabling customary courts to be held though no copyhold tenant be present; (4) for enabling grants of land to be held by copy of court roll, and admissions to be made out of the manors and out of court; (5) for requiring every surrender, grant, and admission, and every fact proved to the lord or steward at any court where a homage is not assembled, to be forthwith entered on the court rolls, and determining that presentment by the homage is not essential to the validity of an admission.

(*c*) Namely, any place separately maintaining its own poor (Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 34).

(*d*) By warrant under the hands of any three or more of the special commissioners for managing the Duchy, or under the hands of any three or more of the persons having the immediate management if the Duchy is vested in the Crown, or under the hands of three or more of the principal officers of the Duchy, or of the persons having the immediate management of the Duchy, if vested in a Duke of Cornwall (*ibid.*, s. 3). As to the provisions for management, see p. 240, *ante*,

(*e*) Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), s. 13.

(*f*) *Ibid.*, s. 3.

(*g*) *Ibid.*, s. 4. For the provision, see p. 222, *ante*.

(*h*) As to the meaning of "minerals" in the Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), see note (*d*), p. 246, *ante*.

(*i*) Duchy of Cornwall Management Act, 1863 (26 & 27 Vict. c. 49), s. 41. The powers of the Inclosure Commissioners were transferred to the Board of Agriculture (now the Board of Agriculture and Fisheries) by the Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2. As to the application of the Inclosure Acts to Cornwall, see p. 199, *ante*. As to inclosure generally, see titles COMMONS, Vol. IV., p. 441; COPYHOLDS; HIGHWAYS, STREETS, AND BRIDGES; OPEN SPACES AND RECREATION GROUNDS.

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560. Nothing contained in the Improvement of Land Act, 1864, is to authorise any person to take, use, enter upon, or interfere with any land, soil, or water, or any right in respect of the same, if belonging to the Sovereign for the time being in right of the Duchy of Cornwall, without the consent in writing of some two or more of the regular officers of the Duchy, or of such other persons as may be duly authorised under the Duchy of Cornwall Management Act, 1863 (*k*), to exercise all or any of the rights, powers, privileges, and authorities exercisable under that Act, or otherwise in relation to the Duchy, or, if belonging to the Duke of Cornwall for the time being, without the consent of the Duke under the Duchy seal for that purpose first had and obtained (*l*).

Improvement of Land Act, 1864.

Nor is the Improvement of Land Act, 1864, to take away, diminish, alter, prejudice, or affect any property rights, profits, privileges, powers, or authorities vested in or enjoyed by the Duke of Cornwall for the time being, or the Sovereign in right of the Duchy (*m*).

561. Neither the London County Council nor any vestry or borough or district council (*n*) may take, or use, or in any manner interfere with any land, soil, tenement, or hereditament, or any right of any nature, of or belonging to the Crown in right of the Duchy of Cornwall, without the previous consent in writing of two or more of the principal officers of the Duchy (which consent such officers are authorised to give). Nothing in the Metropolis Management Amendment Act, 1862 (*o*), is to divest, diminish, or alter any estate, right, privilege, power, or authority vested in or enjoyed by the Crown in respect of the Duchy (*p*).

Metropolis Management Act, 1862.

This provision is, however, subject to a saving of the rights, powers, and authorities of the London County Council (*q*) relating to the main drainage of the metropolis (*r*).

562. Nothing in the Defence Act, 1842, is to vest or be construed to vest in the Secretary of State for War for the time being any estate or interest in any messuages, buildings, castles, forts, lines, or other fortifications, manors, lands, tenements, and hereditaments belonging to the Duke of Cornwall, or other personage entitled for the time being to the revenues of the Duchy, in right or in respect of the Duchy, other than the estate and interest

Defence Act, 1842.

(*k*) 26 & 27 Vict. c. 49, s. 39. For these provisions, see p. 240, *ante*.
(*l*) Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 37.
(*m*) *Ibid.*
(*n*) The Metropolitan Board of Works, vestries, and district boards, in the Act; but their powers have now become vested in the bodies mentioned in the text (see note (*n*), p. 236, *ante*).
(*o*) 25 & 26 Vict. c. 102.
(*p*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 117.
(*q*) Metropolitan Board of Works, in the Act; but see, as to the transfer of powers, note (*n*), p. 236, *ante*.
(*r*) Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 117. These powers are not to be in any manner lessened, altered, prejudiced, or affected by this section, but may be put in force as if it had not been passed (*ibid.*).

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under or by virtue of which the same were held by the Board of Ordnance (now the Secretary of State for War) on the 10th August, 1842 (*s*): and nothing in the Act is to affect, alter, prejudice, or derogate from the estate, right, title, interest, privileges, or authority of the Duke of Cornwall, or other the personage for the time being entitled to the revenues of the Duchy in right or in respect of the Duchy or the possessions thereof (*t*).

Prescription Act, 1832.

563. The provisions of the Prescription Act, 1832, by which a limited protection is afforded to persons claiming any right of common or other benefit (other than tithes, rent, or services) after thirty years' enjoyment, or, in the case of ways or other easements, or any watercourse, or use of any water, after twenty years' enjoyment, and absolute protection in either case after sixty and forty years' enjoyment respectively, unless the enjoyment is by express agreement by deed or in writing, extend to claims over lands of the Duchy of Cornwall (*a*).

(9) *Mines under the Foreshore in Cornwall.*

Property in mines and minerals.

564. As between the Sovereign in right of the Crown (*b*) and the Duke of Cornwall (*c*) in right of the Duchy, all mines and minerals (*d*) lying under the sea-shore between high and low water mark (*e*) within the county of Cornwall (*f*), and under estuaries and

(*s*) Namely, the date of the passing of the Act.

(*t*) Defence Act, 1842 (5 & 6 Vict. c. 94), s. 41. Nothing in the Act is to be admitted in any court of law or equity, or otherwise construed, to alter or affect in any manner the tenure upon which any of the classes of property mentioned in the text above were, previously to the 10th August, 1842, held or set apart for, or placed under the charge of, any person or persons acting under the authority of or in trust for the Crown for the use and service of the ordnance or late barrack department, or for the defence or security of the realm, nor to alter or affect in any manner whatever the estate, right, title, interest, or authority, of the Duke of Cornwall, or other the personage entitled as above, in right or in respect of the Duchy or the possessions thereof (*ibid.*).

(*a*) Prescription Act, 1832 (2 & 3 Will. 4, c. 71), ss. 1, 2; and see, generally, title EASEMENTS AND PROFITS À PRENDRE. Certain provisions of the following Acts apply to the lands or possessions of the Duchy:—The Land Registry Act, 1862 (25 & 26 Vict. c. 53), ss. 114, 140; and the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 65, amended as to possessory titles by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 18, Schedule (see p. 177, *ante*, and, generally, title REAL PROPERTY AND CHATTELS REAL); the Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 13 (see p. 180, *ante*, and, generally, title ECCLESIASTICAL LAW); the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 37 (see p. 257, *ante*, and, generally, title REAL PROPERTY AND CHATTELS REAL); the Crown Suits, &c. Act, 1865 (28 & 29 Vict. c. 104), s. 52 (see title CROWN PRACTICE).

(*b*) As to the right of the Crown to mines under the foreshore, see p. 118, *ante*.

(*c*) This term under the Act, unless repugnant to the context, comprehends the personage for the time being entitled to the revenues of the Duchy, including the Sovereign when there is no Duke of Cornwall (Cornwall Submarine Mines Act, 1858 (21 & 22 Vict. c. 109), s. 8).

(*d*) "Mines and minerals" under the Act, unless repugnant to the context, includes all mines and minerals, quarries, veins, or beds of stone, and all substrata of any other nature, and the ground and soil in, upon, and under which the same lie (*ibid.*).

(*e*) As to the settlement of disputes relating to the lines of high and low water marks, see p. 260, *post*.

(*f*) Exclusive of any lands added or taken away by the Counties (Detached Parts) Act, 1844 (7 & 8 Vict. c. 61), *ibid.*

tidal rivers and other places (below high-water mark), even below low-water mark, being in and part of the county (except mines and minerals in or under land below high-water mark which is part and parcel of any manor belonging to the Sovereign in right of the Crown), are vested in the Duke of Cornwall in right of the Duchy (*g*). But mines and minerals lying below low-water mark under the open sea adjacent to, but not being part of, the county of Cornwall are vested in the Sovereign in right of the Crown as part of the soil and territorial possessions of the Crown (*h*).

Right of access to mines below low-water mark.

565. The Sovereign and all persons entitled in right of the Crown (including his or their lessees or tenants) to, or to the management of, any of the mines and minerals lying below low-water mark under the open sea adjacent to, but not being part of, the county of Cornwall, may take or use, or pass through, over, or under, any land (*i*) of the Duchy within the county of Cornwall for certain specified purposes (*k*), upon giving to the Duke of Cornwall, and to any other persons for the time being interested in the land so required, two months' previous notice stating the nature of the facilities required (*l*).

Conditions.

In making use of these facilities no pit, shaft, adit, drift, level, drain, watercourse, pool, or embankment may be sunk, driven, or made so as to weaken, damage, injure, or endanger any house or other building. Nor may any tramroad, wagon or other way, or any works or machinery be placed, laid, made, or erected, nor any minerals be dressed or made merchantable, within fifty feet of any dwelling-house, or upon any garden or orchard, or so as to interfere with any mining works or operations of the Duke of Cornwall, his lessees or tenants (*m*).

The Sovereign or person making use of the facilities must also make and keep good and sufficient gates, rails, bars, or posts in all places where necessary or proper to shut up or inclose any breach, gateway, or opening made in any of the fences; and must also make all conveniences necessary for the convenience and safety of the owners or occupiers of the lands, of which use is so made, and other lands adjoining the same, and of the public, in order to prevent damage, inconvenience, and trespasses upon the land by cattle or other animals (*n*).

(*g*) Cornwall Submarine Mines Act, 1858 (21 & 22 Vict. c. 109), s. 1.
(*h*) *Ibid.*, s. 2.
(*i*) Either in the occupation of tenants under leases or agreements made after the 2nd August, 1858, or in that of the Duke of Cornwall for the time being.
(*k*) Namely, in order to make or sink any pits, shafts, adits, drifts, levels, drains, watercourses, pools, or embankments, and to make, lay, place, use, and repair any spoil-banks, roads, ways, bridges, and banks, and to make, erect, and repair any lodges, sheds, steam and other engines, buildings, works, and machinery, in, under, upon, through, over, or along the above lands, and to do all other acts necessary or convenient for working, searching for, digging, raising or carrying away, dressing, or making merchantable the above mines and minerals.
(*l*) Cornwall Submarine Mines Act, 1858 (21 & 22 Vict. c. 109), s. 3.
(*m* *Ibid.*
(*n*) *Ibid.*, s. 4.

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566. Compensation must also be made by the Crown or other person making use of the above facilities to the Duke of Cornwall and any other person interested in the lands taken or used both in respect of the use of the facilities, and for any damage or injury occasioned by the same (*o*), the amount of the compensation or damage to be determined as follows :—

Compensation for damage.

When the facilities are used upon, through, over, under, or along lands lying between high and low water mark and being part of the soil of the Duchy possessions, the compensation for the same is to be a sum equal to one-fifteenth part of the net dues or moneys received by the Crown from the mines and minerals below low-water mark worked and gotten by means of the facilities, in addition to compensation for any building, wharf, or other artificial structure affected by the use of the facilities as above, the amount of the latter to be settled by agreement or in the manner following.

Arbitration.

567. If not determined by agreement, the matter in difference must be settled by two arbitrators, one named by the officer having the management of the land revenues of the Crown in Cornwall, and the other by the Duke of Cornwall or the Council for the Duchy, or by other the person or persons, if any, interested in the lands used. The matter is to be determined by the arbitrators, or by an umpire appointed by them before entering upon the reference.

If the arbitrators, or either of them, or the umpire, dies, or refuses or for seven days neglects to act, his place is to be supplied by another person, to be appointed in a similar manner.

The arbitrators or umpire must determine by whom and how the costs of the reference and award or umpirage are to be paid, and may call for any documents in the possession of either party, and summon and examine any witness upon oath, and administer the oath for that purpose (*a*).

Damage by lessees etc.

568. Where damage is done by any lessee or other person in searching or working for mines or minerals under the above powers, the compensation is payable by such lessee or other person committing the damage or his representatives, and not by the Crown (*b*).

Differences as to high or low water mark.

569. Differences as to the true line of high or low water mark between the Sovereign in right of the Crown or any Crown tenants under leases or agreements made after the 2nd August, 1858, and the Duke of Cornwall, are to be settled by arbitration or umpirage in the same manner in all respects as in the case of compensation (*c*).

(*o*) Cornwall Submarine Mines Act, 1858 (21 & 22 Vict. c. 109), ss. 3, 4.
(*a*) *Ibid.*, s. 5.
(*b*) *Ibid.*, s. 6.
(*c*) *Ibid.*, s. 7. The provisions of the Cornwall Submarine Mines Act, 1858 (21 & 22 Vict. c. 109), do not affect any estate, right, title, claim, or demand of any person or body politic or corporate, and their respective representatives (except the Sovereign in right of the Crown, or the Du e of Cornwall in right of the Duchy, and any person or body claiming under any grant, lease,

(10) *Mining Rights in Assessionable Manors.*

Manorial mining rights.

570. With regard to certain assessionable manors in the Duchy of Cornwall (*d*), the following rights as to mines belong absolutely (in so far as they remain undisposed of (*e*)) to the Duke of Cornwall (*f*) as possessions granted by the original charter of Edward III., and thereby annexed to the Duchy, but without prejudice to the estates or rights, if any, of the lessees thereof:—

(1) All mines and minerals (*g*) in and under the tenements which on the 9th August, 1844, or at any time before the 1st May, 1844, were held as conventionary tenements (*h*) of such manors;

agreement, or assurance entered into by them or by the Council of the Duchy subsequently to the 2nd August, 1858) which they had prior to the 2nd August, 1858, or might have had if the Act had not been passed (*ibid.*, s. 9).

(*d*) Namely, Helston-in-Trigg, Penmayne, Tintagel, Restormel, Penlyne, Penkneth, Talskedy, Liskeard, Rillaton, Stoke Climsland, Trematon (statute 7 & 8 Vict. c. 105, s. 53, Sched. I.). Originally the possessions of the Duchy included seventeen assessionable manors, of which the above on the 9th August, 1844, remained unsold, whilst certain other assessionable manors (see note (*n*), p. 262, *post*) had previously to that date been sold under the statutory powers conferred for the redemption of land tax (see, as to these powers, p. 248, *ante*), but with the express exception and reservation in the conveyances of the same of all mines and minerals, and the right to work the same (see the statute 7 & 8 Vict. c. 105, preamble, and Scheds. I., II.; see, as to Duchy property generally, the debate on the Civil List Bill, 1837, Parliamentary Debates, 3rd series, Vol. XXXIX., 1318—1365).

(*e*) See the statutory powers of disposition, p. 242, *ante*.

(*f*) The expression "Duke of Cornwall" in the statute 7 & 8 Vict. c. 105 includes predecessors and successors, and also the Sovereign and his predecessors and successors for the time being entitled to the possessions or revenues of the Duchy during a vacancy thereof (7 & 8 Vict. c. 105, s. 92).

(*g*) As to the meaning of the term "mines and minerals," see title MINES, MINERALS, AND QUARRIES.

(*h*) "Conventionary tenement" in the Act (namely, 7 & 8 Vict. c. 105) includes all lands, tenements, and hereditaments which on the 9th August, 1844, or at any time within a hundred years before the 1st May, 1844, were held as conventionary tenements of the manors mentioned in Scheds. I. and II. to the Act (see note (*d*), *supra*, and note (*n*), p. 262, *post*), whether the tenure has been changed before the passing of the Act (9th August, 1844) or afterwards or not, and also includes undivided and divided parts and shares of and in such conventionary tenements (7 & 8 Vict. c. 105, s. 92). As to the mode of granting conventionary tenements, see this note, *infra*. Commissioners were appointed under the Act to determine—(1) what tenements were within the assessionable manors, their boundaries, identities etc.; (2) what were the wastes and other lands within the manors, or the mines etc. belonging to the Duke; (3) the boundaries and extent of the manors themselves; (4) generally what lands, mines, minerals etc., and hereditaments belonged to the Duke; (5) the rents, services etc., payable by tenants of the conventionary tenements; (6) generally all matters and things relating to the above, and which might enable them to make the award (7 & 8 Vict. c. 105, preamble, s. 13). The awards, which were to be binding and conclusive in all future questions as to the subject-matter thereof (*ibid.*, ss. 40, 48—52), subject to the limited right of appeal within a certain period afforded by the Act, were confirmed and made finally conclusive by the Assessionable Manors Award Act, 1848 (11 & 12 Vict. c. 83, s. 1 (see also p. 262, *post*), subject to certain rights of the lord or lords of the manor of Tywarnhaile and certain others which were not to be prejudiced (see, as to these rights, p. 263, *post*). Conventionary tenements determined to be such by the award for sixty years before the 1st May, 1844 (without prejudice to the mines and metallic minerals thereunder), are turned into freeholds, to be held in free and common socage, subject to the payment of the annual sums or apportioned annual sums determined by the award, for the recovery of which the Duke of Cornwall is to

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(2) All mines, minerals, stone, substrata (*i*), and all other profits whatsoever in, upon, under, and of all waste, including all commons, downs, moors, and uninclosed lands (*k*), and other demesne lands of such manors respectively;

(3) All mines, minerals, stone, and substrata, in, upon, under, and of all other lands lying within or parcel of such manors respectively, and which (namely, the mines, minerals, stones, or substrata) were by certain awards (*l*) determined to belong to the Duke of Cornwall (*m*).

Manors in respect of which mineral rights were reserved.

571. With regard to certain assessionable manors within the Duchy which, before the 9th August, 1844, were sold for the redemption of land tax (*n*), the following rights as to mines belong absolutely (in so far as they remain unsold or otherwise disposed of, and subject also to the rights of the lord of the manor of Tywarnhaile Tyas as to that manor (*o*)) to the Duke of Cornwall as

have the same rights and remedies as in the case of rents reserved on a demise or lease (7 & 8 Vict. c. 105, s. 41). The conventionary tenements first granted within sixty years of the 1st May, 1844, were directed to become part and parcel of the demesne lands of the respective manors, subject to special provisions as to compensation to persons having certain interests therein (*ibid.*, ss. 42, 43); and rights of herbage, pasture, or common, or any other profit or benefit enjoyed over Duchy lands and possessions, and formerly let or granted in gross, and not as appendant or appurtenant to any specific tenement, were not confirmed, but the lands subject thereto freed and discharged therefrom, with power to the commissioners to award certain compensation in the case of common of pasture or turbary (*ibid.*, ss. 44, 45). The estates, interests, uses, trusts, powers, provisoes, and agreements previously subsisting with regard to the conventionary tenements prior to their conversion into freeholds (so far as capable of taking effect in the conventionary tenement) were preserved (*ibid.*, s. 46). The awards of the commissioners do not determine or in any wise prejudice, affect, or extend to any lawful right, profit, privilege, or easement to which the tinners of the county of Cornwall are or claim to be entitled as such tinners under or by force of any statute, custom, prescription, or royal charter, which are to remain in full force and vigour as if the said Act had not been passed (*ibid.*, s. 84). The commissioners were expressly debarred from inquiring or awarding as to any claims to mines or minerals under or by virtue of the custom or supposed custom commonly called "bounding," or as to any claim, title, or interest known by the name of "tin bounds"; and the inquiry of the commissioners was directed to be made without any regard to the custom of "bounding," or any estate or interest acquired thereby, without prejudice to any such custom, supposed custom, estate, or interest (*ibid.*, s. 32). These rights (if any) are therefore unaffected by the awards. As to the custom of "tin bounding," see title MINES, MINERALS, AND QUARRIES.

(*i*) As to the meaning of these terms, see title MINES, MINERALS, AND QUARRIES.

(*k*) The expression "waste" or "waste lands" has this meaning throughout the statute (7 & 8 Vict. c. 105, s. 92).

(*l*) See note (*h*), p. 261, *ante*.

(*m*) Statute 7 & 8 Vict. c. 105, s. 53.

(*n*) Namely, the manors of Tewington, Tybesta, Moresk, Tywarnhaile, Helston-in-Kerrier, Calstock (statute 7 & 8 Vict. c. 105, preamble, Sched. II.; and see note (*d*), p. 261, *ante*). The conveyances under which these manors were sold contained a reservation of "all mines and minerals within and under the same, with full and free liberty of ingress, egress, and regress to dig, search for, take, use, and work the same," and the provision in the text is enacted in order to put an end to doubts as to the rights of the Duke to mines and minerals in such manors (see 7 & 8 Vict. c. 105, preamble).

(*o*) See p. 263, *post*, as to these rights.

possessions granted by the original charter and thereby annexed to the Duchy, but without prejudice to the estates or rights, if any, of persons being lessees of the then Duke of Cornwall on the 9th August, 1844, namely, the right to all mines and metallic minerals in, upon, under, and of the tenements which on the 9th August, 1844, or at any time within one hundred years before that date were held as conventionary tenements of such manors; or in, upon, under, and of all lands lying within such manors which at the time of the sale of the respective manors were waste and demesne lands of the same; or in, upon, and under all other lands lying within or parcel of the same manors respectively, and which (namely, the mines and metallic minerals) were by the above-mentioned awards (*p*) determined to belong to the Duke of Cornwall (*a*).

The property in mines in the freehold tenements of the assessionable manors (other than those which were formerly conventionary tenements but converted into freeholds under the above-mentioned awards) belongs to the freeholders (*b*).

Manor of Tywarnhaile Tyas.

572. The lord or lords of the manor of Tywarnhaile Tyas are entitled in right of their manor or lordship or otherwise to a moiety of all tin mines, tin ore, tin dues, or tin toll throughout the lands awarded (*c*) as the demesne or conventionary lands of the manor of Tywarnhaile, and the Duke of Cornwall is entitled to a moiety of all the like mines, ore, dues, or toll throughout the lands within the manor or lordship of Tywarnhaile Tyas (*d*).

These rights as to the manor of Tywarnhaile are not disturbed, varied, impaired, or prejudiced by the award referred to above, but the Duke of Cornwall and his successors and the lord or lords for the time being of the manor of Tywarnhaile Tyas (or the majority in value of such lords) may by agreement made by deed and enrolled in the office of the Duchy, agree upon and determine all questions which may at any time arise between the above parties relating to the above claims, rights, and interests, and define and settle the same, and make such provisions and regulations for granting, demising, and working the tin mines, ores, dues, and toll, and collecting, recovering, and dividing all profits or advantages accruing or arising therefrom, and generally for doing all matters and things incidental or relating thereto (*e*).

Agreements so made and enrolled, and every demise or grant made in pursuance of the same, are to be binding and conclusive for all purposes whatsoever, subject to a saving to all persons (other than the Duke and the lords of the manor and those claiming by or under them, and other than the parties to any such agreement, demise, or grant as above) of all such estates, rights, titles, interest, and claims in, to, or upon the afore-mentioned lands, mines,

(*p*) See note (*h*), p. 261, *ante*.
(*a*) Statute 7 & 8 Vict. c. 105, s. 54.
(*b*) See note (*h*), p. 261, *ante*, and *Rowe* v. *Brenton* (1828), Concanen's Rep. p. 315; *Crease* v. *Barrett* (1835), 1 Cr. M. & R. 919, 922.
(*c*) See, as to the award, note (*h*), p. 261, *ante*.
(*d*) Assessionable Manors Award Act, 1848 (11 & 12 Vict. c. 83), s. 2.
(*e*) *Ibid.*

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ores, dues, or toll as they lawfully had on the 31st August, 1848 (*f*).

573. Subject to certain restrictions as to parks and pleasure grounds etc. (*g*), and to provisions as to compensation (*h*), notice (*i*), and security for damage (*k*), the Duke of Cornwall and his lessees, and all persons authorised by the Duke, and his or their agents and workmen may enter into and upon all lands or tenements of any tenure situate or being within, or held of, any of the said manors (*l*), in which any mines, minerals, stone, or substrata belong to the said Duke as above, and search, dig for, open, and work such mines, and get, carry away, and dispose of the minerals, stone, or substrata, and erect all such buildings, steam and other engines, machinery, and things, and sink and make all such pits, shafts, levels, adits, air-holes, tram and other roads, and other works, and take sufficient stone, lime, and slate for such buildings and other works, and take and use and divert all such water, and take and use all such room for ore and rubbish and other things, and do all such other acts and things upon, under, in, and about the above lands and tenements, as may be necessary or convenient for working the mines aforesaid, and getting, washing, dressing, rendering merchantable, carrying away, and disposing of the same minerals, stone, or substrata (*m*).

Right to search for and work mines etc.

Notice to occupiers.

574. Before entry may be made by the Duke of Cornwall or any other person under the above provisions upon any lands or tenements (other than waste lands) to search, dig for, open, work, or get any mines or minerals, one calendar month's previous notice in writing must be given of the intended entry to the occupier of the surface, or (if the occupier or his place of abode be unknown or uncertain) affixed in or upon some conspicuous part of the lands or tenements. The notice must specify and describe the lands and tenements upon which the entry is to be made, and must state the name and place of abode of the person by whom or on whose behalf the entry is intended to be made (*n*). Security for compensation must also be

(*f*) Assessionable Manors Award Act, 1848 (11 & 12 Vict. c. 83), s. 2.

(*g*) Nothing in the statute 7 & 8 Vict. c. 105 is to authorise or empower the Duke of Cornwall or any person claiming under him to erect any building or steam or other engine, machinery, or thing, or to sink or make any pit, shaft, air-hole, tram, or other road, or to lay any ore, rubbish, or other thing, or to enter into or upon the surface of any land which the commissioners by their award (see note (*h*), p. 261, *ante*) certified, and were so required to certify, to have been on the 1st May, 1844, appropriated as a garden, park, or pleasure ground, or as a dwelling-house or yard or curtilage to the same, and which afterwards continues to be so appropriated, or in or upon any land which may at any time after the 9th August, 1844, at the time of entry be actually and *bonâ fide* appropriated and used as a dwelling-house, or as a yard, curtilage, or garden attached to the same, so long as the same continues to be so appropriated, and so that no such yard, curtilage, or garden extends more than fifty feet from such dwelling-house (7 & 8 Vict. c. 105, s. 70).

(*h*) As to compensation, see p. 265, *post*.

(*i*) See the text *infra*.

(*k*) See p. 265, *post*, and note (*o*), *ibid.*

(*l*) See note (*d*), p. 261, and note (*n*), p. 262, *ante*.

(*m*) Statute 7 & 8 Vict. c. 105, s. 55.

(*n*) *Ibid.*, s. 60.

given by any person (other than the Duke of Cornwall) before entry for the above purposes upon any lands or tenements (other than waste lands), if required so to do by any person interested in the lands or tenements (*o*).

Compensation.

575. Adequate compensation in such cases must be made by the Duke or other persons making use of these powers to the persons entitled to the surface of such lands or tenements, or to such water, for the damage done or occasioned by the exercise of the above rights, privileges, and easements, and to the persons entitled to the materials for any such materials taken. A claim for compensation for damage must be made in writing before the expiration of six calendar months after the damage was done, or from the time when the entry or other act by which the damage was done determines or ceases, where such entry or other act is of a continuing nature (*p*).

Compensation provisions do not apply to waste lands.

576. The provisions rendering the Duke of Cornwall and his lessees, and other persons authorised by him, liable to make compensation for the damage done to the surface of lands and tenements do not apply to any lands or tenements which by the

(*o*) The security is to be given by depositing £20 or any larger sum which the person entering may think fit with the registrar of the court of the Vice-Warden of the Stannaries of Cornwall, now the registrar of the county court, the Vice-Warden's court being abolished and its powers transferred to the county courts of Cornwall (see Stannaries Court (Abolition) Act, 1896 (59 & 60 Vict. c. 45), s. 1, and p. 241, *ante*), or giving to the registrar a joint and several bond under the hands and seals of the person entering, and of one or two sufficient sureties (in case of dispute to be approved of by the registrar, or by any two justices of the peace for the county of Cornwall), conditioned for securing to the said registrar, or to the registrar for the time being of the county of Cornwall, on demand by him, payment of the sum of £20 or any larger sum as aforesaid. The sum so deposited or secured by bond is to be held by the registrar as a security for the payment of the compensation (see *infra*) to become payable for the damage caused by the entry, and for the costs to be incurred in any proceeding for determining the amount of the compensation, or otherwise in relation thereto. The deposit, or the money recovered upon the bond, is to be paid and applied by the registrar accordingly either upon satisfactory proof being made to him of the same having become payable and of the person entitled thereto or part thereof, or according to the direction of the county court judge (see *infra*). If the amount of the damage (to be decided in the manner described *infra*) and of such costs, if any, is equal to or exceeds the sum deposited or secured, the county court judge is required, upon the application of any person interested in the lands or tenements, to issue his injunction to stop the further prosecution of the search for minerals until the amount of the previous damage and such costs, if any, have been paid by the person liable, or until a further deposit of not less than £20 or a further bond for a similar amount, and with one or two sureties, to be approved of as above, has been made with or given to the registrar as a security for the compensation for the further damage, which further sum is to be paid and applied by the registrar as above (statute 7 & 8 Vict. c. 105, s. 61). Bonds given under the Act are not chargeable with any stamp duty (*ibid.*, s. 91).

(*p*) Statute 7 & 8 Vict. c. 105, s. 55. Disputes are to be settled either by two justices of the peace for the county of Cornwall or by the county court judge (*ibid.*, s. 56; and see note (*o*), *supra*). The Act also contains provisions as to the persons who may be entitled to receive compensation (s. 57), the interests of limited owners (s. 58) and persons under disability (s. 59), and other incidental matters (ss. 62—66). The Duke of Cornwall is not liable to the payment of compensation for damage done by any lessee or other person in or about any searching or working for mines or minerals under the provisions in question (*ibid.*, s. 67).

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previously mentioned awards have been determined to be waste or demesne lands of the manors remaining unsold on the 9th August, 1844, or to any lands or tenements which at the respective dates of the conveyances of the manors sold for the redemption of land tax prior to that date were waste or demesne lands of the same manors respectively (*q*).

Rights as to machinery etc.

Subject and without prejudice to the liens, rights, and remedies given to the persons becoming entitled to compensation for damage, the Duke of Cornwall and his lessees, and other the persons authorised by him, and his and their agents and workmen, may either pull down, remove, and take away, or fill up all buildings, steam and other engines, machinery, and things, pits, mines, dams, sluices, and works which may be erected or fixed or opened or worked upon any lands and tenements in pursuance of the above provisions, and which are no longer used for the purposes stated above, or allow the same to remain for any time which he or they (namely, the Duke of Cornwall, his lessees etc.) may think fit after the same have ceased to be used for such purposes; and no buildings, mines, pits, works, or other things, are by non-user or otherwise to be deemed to be abandoned so as to vest any right or title in the same in the owner of the land, or to give any fresh right of compensation on the same being resumed or again entered upon and used (*r*).

Tenure of manors.

577. All the manors, lands, tenements, and hereditaments already referred to (*s*) are (except in cases which are otherwise expressly provided for) to be held of the Duke of Cornwall, and all other persons respectively, by the same tenures, services, fee farms, chief rents, heriots, and other duties, to all intents and purposes as the same should or ought of right to be held if the estates, rights, and interests established and made sure under the above provisions (*t*) had been firm, good, and effectual in law before the 9th August, 1844 (*u*).

(11) *Special Provisions relating to Mines.*

Mining matters.

578. The rights and obligations relating to mining partnerships, cost-book companies, the wages and rights of miners in metalliferous mines and tin streaming works, mining clubs, and various matters relating thereto within the Stannaries, and falling within the former jurisdiction of the Vice-Warden of the Stannaries Court (which has as from the 1st January, 1897, been transferred to the judge of the county courts in Cornwall (*v*)), are regulated principally by the Stannaries Acts, 1869 and 1887 (*w*).

(*q*) Statute 7 & 8 Vict. c. 105, s. 68; see note (*d*), p. 261, and note (*n*), p. 262, *ante*.

(*r*) *Ibid.*, s. 69.

(*s*) Namely, those included in the statute 7 & 8 Vict. c. 105.

(*t*) Namely, those contained in the statute 7 & 8 Vict. c. 105. As to the awards of the commissioners which settled disputes relating to mines etc., see note (*h*), p. 261, *ante*.

(*u*) Namely, the date when the Act was passed.

(*v*) See note (*o*), p. 265, *ante*. As to the jurisdiction and procedure of the Stannaries Court, see the Stannaries Acts, 1836 (6 & 7 Will. 4, c. 106), ss. 4, 6, 7, and 1855 (18 & 19 Vict. c. 32); Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 18; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 177; Stannaries Court (Abolition) Act, 1896 (59 & 60 Vict. c. 45). See, generally, title COURTS.

(*w*) 32 & 33 Vict. c. 19; 50 & 51 Vict. c. 43, which is partially repealed by the Statute Law Revision Act, 1908 (8 Edw. 7, c. 49), and the Companies

(12) *Special Provisions for the Limitation of Actions and the Quieting of Titles.*

SECT. 4. Revenues of Hereditary Nature retained by the Crown.

Limitation of actions in respect of Duchy matters.

579. The general Statutes of Limitation are not binding upon the Crown unless made so either expressly or by necessary implication (*x*), and this principle extends, it is apprehended, to the person in possession of the Duchy of Cornwall for the time being, whether he be the Sovereign or the heir apparent (*y*). In addition, however, to the cases in which the provisions of the Crown Suits Acts, 1769 and 1861 (*z*) (the operation of which is in general confined to Duchy property lying outside the county of Cornwall, or to certain rights relating to the foreshore), are expressly extended to the Duke of Cornwall (*a*), express provision is made for the limitation of suits with regard to certain classes of Duchy property within the county of Cornwall (*b*), and suits and actions relating to interests in mines and conventionary tenements within the assessionable manors of the Duchy are specially dealt with (*c*).

Actions as to real property not within the county of Cornwall.

580. As to hereditaments not within the county of Cornwall and also as to such hereditaments within the said county as are excepted from the special provisions enacted with regard to certain property and suits within the Duchy (*d*) (including any property, right, claim, or question, of, to, or concerning navigable rivers, estuaries, ports, or branches of the sea, or the fundus or soil, or the shores between high and low water mark of the same respectively (*e*)), all the provisions of the Crown Suits Act, 1769 (*f*), as extended by the Crown Suits Act, 1861 (*g*), together with a portion of the special enactment relating to other portions of the Duchy (*h*), extend and are applicable to the Duke of Cornwall in like manner as if he were throughout mentioned or referred to where the "King's Majesty" or "His Majesty" is in the Acts mentioned or referred to (*i*).

(Consolidation) Act, 1908 (8 Edw. 7, c. 69). See also the Companies Acts, 1862 (25 & 26 Vict. c. 89), ss. 4, 68, 174 (3), 199 (4); and 1890 (53 & 54 Vict. c. 63), ss. 1, 3; as from 1st April, 1909, these Acts are repealed by and re-enacted in the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69); Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), ss. 4, 5. See, generally, titles COMPANIES, Vol. V.; MINES, MINERALS, AND QUARRIES.

(*x*) See Vol. VI., p. 410, and *R.* v. *Bayly* (1841), 1 Dr. & War. 213. This exemption extends to the case where the Crown is acting only as a trustee for the public, *e.g.*, where (as in the case cited) the action is brought on a recognisance to secure the performance of a public duty.

(*y*) As to when the Sovereign is entitled, see p. 239, *ante*.

(*z*) 9 Geo. 3, c. 16; 24 & 25 Vict. c. 62.

(*a*) See *infra* and following pages.

(*b*) By statute 7 & 8 Vict. c. 105. As to cases where this Act does not apply, see ss. 76, 77, 79—88 thereof.

(*c*) See pp. 261 *et seq.*, *ante*.

(*d*) Namely, those excepted from the operation of the statute 7 & 8 Vict. c. 105, the provisions of which are given in the text below (pp. 268 *et seq.*, *post*).

(*e*) Statutes 23 & 24 Vict. c. 53, preamble; 7 & 8 Vict. c. 105, s. 86.

(*f*) 9 Geo. 3, c. 16. For the provisions of this Act, see title LIMITATION OF ACTIONS.

(*g*) 24 & 25 Vict. c. 62, ss. 1, 2, 4. For these provisions, see title LIMITATION OF ACTIONS.

(*h*) Namely, ss. 72 and 75 of the statute 7 & 8 Vict. c. 105, as to which see pp. 269, 270, *post* (statute 23 & 24 Vict. c. 53, s. 1).

(*i*) Statute 23 & 24 Vict. c. 53, s. 1; Crown Suits Act, 1861 (24 & 25 Vict. c. 62), ss. 1, 2, 4.

SECT. 4. Revenues of Hereditary Nature retained by the Crown.

Under the above provisions claims by the Duke of Cornwall relating to the hereditaments falling within such classes of property (other than liberties or franchises) are, in general, barred by the lapse of sixty years (*k*), notwithstanding that the same have been in charge to the Duke of Cornwall, or his predecessors or successors, or stood insuper of record, within that space of time, the fact of having been in charge, or of having stood insuper of record, being as against the person or persons who have been in enjoyment of the hereditaments for the period of sixty years, and all claiming by, from, or under them or any of them, of no force and effect (*l*).

Actions as to real property within the county of Cornwall.

581. As to Duchy property within the county of Cornwall not falling within the above classes, the Duke of Cornwall may not at any time sue, impeach, question, or implead any person for or in any wise concerning any lands, manors, tenements, rents, tithes, or hereditaments whatsoever, situate, issuing, or arising in the county of Cornwall (other than liberties or franchises, and other than mines, minerals, stone, or substrata), or for or in any wise concerning the revenues, issues, and profits of the same, nor may he make any title, claim, challenge, or demand of, on, or to the same (except as aforesaid), by reason of any right or title which has not first accrued or grown within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding as may at any time be filed, issued, or commenced for recovering the same, or in respect thereof (*m*), unless the Duke of Cornwall (or some other person under whom he lawfully has or claims anything in the same by force of any right or title) has been answered by force and virtue of any such right or title to the same, or the rents, revenues, issues, or profits thereof, within the said space of sixty years (*n*).

The Duke of Cornwall, his heirs or successors (*o*), may not sue, impeach, question, or implead any person or persons for or in any wise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever in the county of Cornwall (other than franchises or liberties, and, it seems, other than mines, minerals, stone, or substrata (*p*)), which such person or persons, or his or

(*k*) Crown Suits Act, 1769 (9 Geo. 3, c. 16). As to the particulars of this provision, see title LIMITATION OF ACTIONS.

(*l*) Crown Suits Act, 1861 (24 & 25 Vict. c. 62), ss. 1, 2; and see for particulars, title LIMITATION OF ACTIONS.

(*m*) 7 & 8 Vict. c. 105, s. 71—an Act for quieting titles within the Duchy. The provisions of this Act only apply to property within the county of Cornwall, and not to various matters which are set out in ss. 76, 77, 79—88 of the Act.

(*n*) 7 & 8 Vict. c. 105, s. 71. The words "or that the same shall have been duly in charge to the Duke of Cornwall, or have stood insuper of record within the said space of sixty years," which follow in the Act have been impliedly repealed by ss. 1, 2, of the Crown Suits Act, 1861 (24 & 25 Vict. c. 62), as to which see p. 269, *post*.

(*o*) Namely, the date of the passing of the Crown Suits Act, 1861 (24 & 25 Vict. c. 62).

(*p*) This provision is to be construed together with and be deemed to form part of the statute 7 & 8 Vict. c. 105 (Crown Suits Act, 1861 (24 & 25 Vict. c. 62),

their or any of their ancestors or predecessors, or those from, by, or under whom they claim, have or shall have held or of which they have or shall have enjoyed or taken the rents, issues, or profits by the space of sixty years next before the filing, issuing, or commencing of the proceeding (*q*).

But the Duke of Cornwall, or any person under whom the Duke of Cornwall has or lawfully claims as aforesaid, is not to be deemed, for the purposes of these provisions, to have been answered by force or virtue of any such right or title, the rents, revenues, issues, or profits of any lands, manors, tenements, rents, tithes, or hereditaments which have been held or enjoyed, or of which the rents, revenues, issues, or profits have been taken by any other person by the space of sixty years next before the filing, issuing, or commencing of any such action, suit, bill, plaint, information, commission, or other suit or proceeding for recovering the same, or in respect thereof, by reason of the same having been part or parcel of any honour or manor or other hereditament of which the rents, revenues, issues, or profits have been answered to the Duke of Cornwall, or any other person under whom the Duke of Cornwall has or lawfully claims as aforesaid, or which honour or manor or other hereditament shall have been duly in charge to the Duke of Cornwall, or to or with any officer of the Duchy of Cornwall, or stood insuper of record (*r*).

Actions as to mines and minerals.

582. The Duke of Cornwall may not sue, impeach, question, or implead any person for or in any wise concerning any mines, minerals, stone, or substrata in, upon, under, or of any lands, manors, tenements, or hereditaments whatsoever situate in the county of Cornwall in the following cases:—

(1) Where the lands, manors, tenements, or hereditaments have been held or enjoyed by such person, or any person by, through, or under whom he claims, or any person whomsoever other than the Duke of Cornwall, or any person claiming under him, for a period of sixty years or more, without interruption or disturbance by the Duke of Cornwall or any person claiming under him, before the filing, issuing, or commencing of the action, bill, plaint, information, commission, or other suit or proceeding in respect of the mines, minerals, stone, or substrata, and where such mines, minerals, stone, or substrata have been substantially worked and gotten at any time during such period by the person who has so held and enjoyed the said lands etc., and the mines, minerals, stone, or substrata have not been at any time during the period of sixty years worked, gotten, or the tolls, dues, royalties, and other profits

s. 2); it seems, therefore, that it must be read with s. 71 of that Act, which excludes mines, minerals etc., and not with ss. 73 and 74, relating to mines and minerals, as to which separate provision is made (see as to these, p. 270, *post*).

(*q*) Crown Suits Act, 1861 (24 & 25 Vict. c. 62), ss. 1, 2. This provision also applies to suits as to property not within the county of Cornwall and the other classes of property excluded from the operation of the statute 7 & 8 Vict. c. 105, as to which see note (*m*), p. 268, *ante*.

(*r*) Statute 7 & 8 Vict. c. 105, s. 72. This provision applies also to Duchy property not within the statute (see note (*m*), p. 268, *ante*).

SECT. 4. Revenues of Hereditary Nature retained by the Crown.

thereof, received or enjoyed by the Duke of Cornwall or some person claiming under him (*s*);

(2) Where the lands, manors, tenements, or hereditaments have been held or enjoyed by such person, or any person by, through, or under whom he claims, or any person whomsoever other than the said Duke, or any person claiming under him, for a period of one hundred years, without interruption by the said Duke or any person claiming under him, before the commencement of the proceedings in respect of the mines, minerals etc., subject to a similar condition as to the non-user or receipt of tolls etc. by the Duke of Cornwall or person claiming under him during that period (*t*).

583. The above provisions as to property within the county of Cornwall apply notwithstanding that the manors, lands, tenements, rents, tithes, or hereditaments, or the rents, revenues, issues, or profits of the same, have been in charge to the Duke of Cornwall or his predecessors or successors or stood insuper of record within the said space of sixty years, such standing in charge or insuper of record being of no force and effect as against such person or persons and all claiming by, from, or under them (*u*).

SUB-SECT. 3.—*The Revenues of the Principality of Scotland.*

Principality of Scotland.

584. The eldest son of the Sovereign, as Prince and Steward of Scotland by inheritance, is entitled to the revenues of the Principality of Scotland (*a*), which are not included in the surrender effected by the Civil List Act. Until a son is born, the Principality remains vested in the Sovereign as Prince and Steward in right of the Crown (*b*), and the prerogatives of the Crown extend to the possessions of the Principality whilst so vested (*c*).

It has been held that grants by the Crown whilst no heir exists are void unless made by the Sovereign as Prince of Scotland (*d*), and that when there is a Prince existing they must be made by the Sovereign expressly as administrator (*e*).

The land revenues, lands, teinds, feu retour, and other duties and casualties of the Crown in Scotland (including those of

(*s*) Statute 7 & 8 Vict. c. 105, s. 73.

(*t*) *Ibid.*, s. 74.

(*u*) Crown Suits Act, 1861 (24 & 25 Vict, c. 62), ss. 1, 2. Rents, revenues, issues, and profits duly in charge by, to, or with any proper officer of the Duchy are to be deemed to be held and taken as duly in charge within the meaning and intent of the above provisions, any usage or custom to the contrary notwithstanding (statute 7 & 8 Vict. c. 105, s. 75; Crown Suits Act, 1861 (24 & 25 Vict. c. 62), s. 2). These provisions as to land in charge etc. apply to the lands etc. excluded from the operation of the 7 & 8 Vict. c. 105 (see statute 23 & 24 Vict. c. 53, s. 1; Crown Suits Act, 1861 (24 & 25 Vict. c. 62), s. 2).

(*a*) *Purves* v. *Luss* (*Laird*) (1680), Mor. Dict. 8542, where the history of the Principality is discussed.

(*b*) *Johnston* v. *Riccarton* (1608), Mor. Dict. 11,685-6. It is said, on the authority of this case, that the Sovereign, whilst there is no heir apparent, holds the Principality in his own right, and not as administrator of a future heir (*ibid.*, 11,686).

(*c*) *Purves* v. *Luss* (*Laird*), *supra*.

(*d*) *Johnston* v. *Riccarton*, *supra*; but see *Hamilton* v. *Bargany* (*Vassals*) (1626), Mor. Dict. 6622-3.

(*e*) *Ibid.*

the Principality of Scotland) have been placed under the management of the Commissioners of Woods and Forests (*f*), and are subject, in general, to such of the provisions relating to sales, leases, exchanges, and the general administration of Crown lands in England under the Crown Lands Act, 1829, as are applicable (*g*).

SECT. 4. Revenues of Hereditary Nature retained by the Crown.

SECT. 5.—*The Civil List.*

SUB-SECT. 1.—*Annuities and Pensions.*

585. In return for the surrender of the hereditary revenues (*h*) there is to be paid for the King's civil list during the present reign and six months thereafter the yearly sum of £470,000 (*i*), to be applied to the following classes of expenditure: Revenue from public funds.

(1) Their Majesties' privy purse	£110,000
(2) Salaries of His Majesty's household and retired allowances	125,800
(3) Expenses of His Majesty's household	193,000
(4) Works	20,000
(5) Royal bounty, alms, and special services.	13,200
(6) Unappropriated	8,000 (*k*).

The Treasury is empowered to direct, at the end of any calendar year, that the surplus of the sum appropriated to any class may be applied as an addition to the sum available for any other class (*l*).

586. The payment of the following annuities is also provided for:— Annuities.

(1) To Her Majesty Queen Alexandra, in the event of her surviving the King, £70,000 during her life (*m*).

(2) To the Duke of Cornwall and York, now the Prince of Wales, during the joint lives of himself and the King, £20,000 (*a*).

(3) To the Princess of Wales, during the continuance of her marriage with the Prince of Wales, £10,000 for her sole and separate use, but without power of anticipation, and in the event of her surviving the Prince of Wales, £30,000 during her life (*b*).

587. A trust fund for the benefit of the King's daughters is to be created by paying to the "Princesses' trustees" (*c*) the annual Provision for the King's daughters.

(*f*) Crown Lands (Scotland) Act, 1832 (2 & 3 Will. 4, c. 112), s. 1; Crown Lands (Scotland) Act, 1833 (3 & 4 Will. 4, c. 69), s. 20; Crown Lands Act, 1851 (14 & 15 Vict. c. 42), ss. 1, 2.

(*g*) Crown Lands (Scotland) Act, 1833 (3 & 4 Will. 4, c. 69), ss. 2, 3. The revenues of the Principality of Scotland are not specifically mentioned, but are included, it seems, in the general words relating to Crown property.

(*h*) See pp. 109 *et seq.*, *ante*.

(*i*) Civil List Act, 1901 (1 Edw. 7, c. 4), s. 2.

(*k*) *Ibid.*, s. 6 (1), Sched. I.

(*l*) *Ibid.*, s. 6 (2).

(*m*) *Ibid.*, s. 5.

(*a*) *Ibid.*, s. 3 (1).

(*b*) *Ibid.*, s. 3 (2), (3).

(*c*) These are the persons who are for the time being First Commissioner of the Treasury, Chancellor of the Exchequer, and Keeper of His Majesty's Privy Purse. These are to be a body corporate, and their acts may be authenticated under their hands and seals (*ibid.*, s. 4 (2)).

SECT. 5. The Civil List.

sum of £18,000 during the joint lives of the said Princesses, to be reduced by £6,000 on the death of each of them (*d*). The trustees are to hold the fund in trust for all or any one or more of the Princesses in such shares and subject to such conditions as His present Majesty may appoint (*e*).

Retired allowances.

588. The Treasury is empowered to undertake the payment of certain retired allowances (up to a total of £12,000) granted by Her late Majesty as part of the expenditure of class II. of her civil list (*f*); also any retired allowances granted by His present Majesty (up to a total of £13,000) before the 23rd July, 1901, to persons having been in Her late Majesty's service for more than ten years (*g*).

Civil list pensions.

589. The Crown, acting upon the advice of its responsible advisers, is also empowered to grant civil list pensions (up to a total of £1,200 per annum) to such persons only as have just claims upon the royal beneficence, or who, by their personal services to the Crown, by the performance of duties to the public, or by their useful discoveries in science and attainments in literature and the arts, have merited the gracious consideration of their Sovereign and the gratitude of their country (*h*)

Payments to be charged on Consolidated Fund.

590. All sums payable under the Act are to be charged on and paid out of the Consolidated Fund or the growing produce of the same at the times and in the manner directed by the Treasury (*i*), and are to be free of taxes and all other charges and deductions (*k*).

SUB-SECT. 2.—*Audit of the Civil List.*

Audit.

591. That part of the civil list which belongs to the departments of the Lord Chamberlain, the Lord Steward, and the Master of the Horse is to be audited (*l*) by an officer appointed by the Lord High Treasurer or the Commissioners of the Treasury or any three or more of them (*m*), who is empowered to examine the

(*d*) Civil List Act, 1901 (1 Edw. 7, c. 4), s. 4 (1).

(*e*) The appointment is to be by order countersigned by the First Commissioner of the Treasury and the Chancellor of the Exchequer, and may be varied by a like order (*ibid.*, s. 4 (3)).

(*f*) *Ibid.*, s. 7 (a). As to class II. of the civil list referred to, see the Civil List Act, 1837 (1 Vict. c. 2), Schedule.

(*g*) Civil List Act, 1901 (1 Edw. 7, c. 4), s. 7 (b). A register is to be kept by the Treasury of any allowances so undertaken (*ibid.*).

(*h*) Civil List Act, 1901 (1 Edw. 7, c. 4), s. 9 (1); Civil List Act, 1837 (1 Vict. c. 2), ss. 5, 6. These pensions are not to be granted as chargeable on the sum paid for the civil list (Civil List Act, 1901 (1 Edw. 7, c. 4), s. 9 (1). A list of the pensions granted in each year ending the 20th June is to be laid before Parliament within thirty days of that date, if Parliament is then sitting, or, if not, then within thirty days of the meeting of the next Parliament (Civil List Act, 1837 (1 Vict. c. 2), s. 6).

(*i*) Civil List Act, 1901 (1 Edw. 7, c. 4), s. 8.

(*k*) Civil List Act, 1837 (1 Vict. c. 2), s. 14.

(*l*) *Ibid.*, s. 9 (2); Civil List Audit Act, 1816 (56 Geo. 3, c. 46).

(*m*) Civil List Audit Act, 1816 (56 Geo. 3. c. 46), s. 8. The officer may receive such salary as His Majesty thinks fit, not exceeding £1,500. He may not be elected to, or sit and vote in, Parliament (*ibid.*).

accounts and vouchers of those departments according to instructions drawn up by the Treasury, and to summon persons before him, require the production of books, accounts, and vouchers, and examine upon oath (*n*).

A statement of the accounts, when made up, is to be delivered to the Commissioners of the Treasury, and an allowance by the latter, or any three of them, and a sign manual warrant constitutes a full and final discharge upon the accounts (*o*).

SECT. 6.—*Crown Private Estates.*

SUB-SECT. 1.—*Common Law Rules Relating to Private Estates.*

Application of the prerogative.

592. At common law the general rule appears to be that the prerogatives of the Crown extend to private estates vested in the Sovereign in his body natural, as they do to those vested in him in his body politic in right of the Crown (*p*), and that the former can only be dealt with subject to the same incidents and formalities in general as the latter, the Sovereign being impressed, as it were, in his body natural with the qualities of his body politic (*q*). Thus, a grant of lands in the Duchy of Lancaster, which was held to be vested in the Sovereign in his body natural separate from the Crown (*r*), was not void for the nonage of the King (*s*); and other rules relating to the prerogative have been held applicable to interests of the Crown in the Duchy (*t*).

Exceptions.

593. But in some cases private estates vested in the Sovereign in his body natural are not affected with prerogative privileges. Thus, where land was vested in the Sovereign in his natural capacity under a grant by a subject to Henry VII. and the heirs male of his body begotten, he was bound by statute and took a fee tail estate *per formam doni* (*a*).

Lands purchased before accession, or descending from collateral ancestors before or after accession, vest in the Sovereign in his natural capacity (*b*); but if not granted away or devised, they descend with the Crown upon the demise of the Sovereign and become vested in his successors in right of the Crown (*c*).

Where lands in gavelkind descend to the Sovereign and his

(*n*) Civil List Audit Act, 1816 (56 Geo. 3, c. 46), ss. 8, 9, 10. Persons convicted of giving false evidence before him are to be guilty of perjury (*ibid.*, s. 11).

(*o*) *Ibid.*, s. 12.

(*p*) *Case of the Duchy of Lancaster* (1561), Plowd. 212, 213, 222; *R.* v. *York* (*Archbishop*) (1591), Cro. Eliz. 240, 241; *Alcock* v. *Cooke* (1829), 5 Bing. 340, *per* BEST, C.J., at pp. 351—354; Co. Litt. 43 a, b; 4 Co. Inst. 209.

(*q*) *Case of the Duchy of Lancaster, supra*, at p. 213; see also Co. Litt. 43 a, b; *Willion* v. *Berkley* (1562), Plowd. 223, 234; see also Vol. VI., pp. 363, 364, *ante*.

(*r*) See p. 218, *ante*.

(*s*) *Case of the Duchy of Lancaster, supra*.

(*t*) See p. 218, *ante*. Private estates always passed by letters patent without livery and were not void for the nonage of the King (see Chitty, Prerogatives of the Crown, p. 206).

(*a*) *Willion* v. *Berkley* (1562), Plowd. 223; and see *Case of a Fine levied by the King Tenant in Tail* (1604), 7 Co. Rep. 32 a; see also Vol. VI., pp. 364, 493.

(*b*) Co. Litt. 15 b, note 4.

(*c*) Chitty, Prerogatives of the Crown, p. 206; see also p. 275, *post*.

SECT. 6. Crown Private Estates.

brother, each takes a moiety; but on the demise of the Sovereign his moiety descends to his eldest son, and not to all the sons equally (*d*).

SUB-SECT. 2.—*Definition of Statutory Private Estates.*

Private estates of the Crown.

594. With regard to real property, the private estates of the Crown, as statutorily defined, consist of such lands, hereditaments etc. of any tenure as are purchased out of moneys issued and applied for the use of the privy purse, or coming to the Crown in any manner from any ancestor or other persons not being Kings or Queens of the realm, or which, belonging to the Sovereign or any persons in trust for the Sovereign at the time of his or her accession, might have been legally disposed of by gift, sale, or devise (*e*).

This definition was subsequently extended to such private estates of the King or Queen as become vested by gift, devise, or disposition made by such King or Queen in any person who at the time of vesting or afterwards may be or become King or Queen of the realm, unless a contrary intention is expressed in the gift, devise, or disposition (*f*).

SUB-SECT. 3.—*Dispositions of Private Estates.*

Right of Sovereign to dispose of private estates.

595. Private estates, as so defined, are exempted from the provisions and restrictions of the Acts restraining the alienation of Crown lands (*g*) and of the Civil List Acts (*h*) and of any other Acts relating to real estate belonging to the Sovereign in right of the Crown (*i*).

They may be disposed of (except lands in Scotland (*k*)) by sale, gift, or otherwise by any instrument under the royal sign manual

(*d*) Co. Litt. 15 b.

(*e*) Crown Private Estate Act, 1800 (39 & 40 Geo. 3, c. 88) s. 1, as extended by the Crown Lands Act, 1823 (4 Geo. 4, c. 18); Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), s. 1. The latter Act was passed in order to put an end to doubts as to whether the provisions of the Crown Lands Act, 1702 (1 Ann. c. 1; stat. 1, c. 7, Ruff.), restricting alienation had not been extended by the Pensions Act, 1838 (1 & 2 Vict. c. 95), to private estates of the Crown (see the preamble to the Act).

(*f*) Crown Private Estates Act, 1873 (36 & 37 Vict. c. 61), s. 1. The extended definition applies only to the provisions of the Crown Private Estates Acts, 1862 and 1873. The provisions of the Crown Private Estate Act, 1800 (39 & 40 Geo. 3, c. 88), apply only to estates embraced by the narrower definition. This distinction must be borne in mind, notwithstanding the fact that the provisions of the Crown Private Estate Act, 1800 (39 & 40 Geo. 3, c. 88), have been largely superseded by the Crown Private Estates Acts, 1862 (25 & 26 Vict. c. 37) and 1873 (36 & 37 Vict. c. 61).

(*g*) The Acts specially referred to are the Crown Lands Act, 1702 (1 Ann. c. 1; stat. 1, c. 7, Ruff.), and the statute 34 Geo. 3, c. 75; the latter Act was repealed by the Statute Law Revision Act, 1861 (24 & 25 Vict. c. 101). See the Crown Private Estates Acts, 1862 (25 & 26 Vict. c. 37), s. 2, and 1873 (36 & 37 Vict. c. 61), s. 1.

(*h*) The Civil List Act, 1760 (1 Geo. 3, c. 1), is the Act referred to, but the exemption would extend by implication to all subsequent Civil List Acts.

(*i*) Crown Private Estates Acts, 1862 (25 & 26 Vict. c. 37), s. 2, and 1873 (36 & 37 Vict. c. 61), s. 1. As to fee simple lands remaining undisposed of on the demise of the Crown, see p. 275, *post*.

(*k*) As to dispositions of land in Scotland, see p. 275, *post*.

attested by two or more witnesses, or by will or testamentary disposition signed by the testator or testatrix, or by some other person in his or her presence and by his or her direction, in the presence of two witnesses, as freely in all respects as by an ordinary subject (*l*). The will is to speak and take effect as if executed immediately before the death of the testator or testatrix unless the contrary appears (*m*).

Where land forming part of the private estates of the Sovereign has been so devised by any testator dying after the 31st December, 1833, to the heir, or to the person who shall be the heir, of the testator, the latter acquires the land as a devisee and not by descent.

Where land forming part of the Crown private estates is limited by the Sovereign by any assurance as above after the 31st December, 1833, to the person or heirs of the person assuring the same, the person so conveying acquires the land as a purchaser by virtue of the assurance, and is not to be considered to be entitled as of his former estate (*n*).

Estates in Scotland.

596. Private estates in Scotland may be validly disposed of by instrument *inter vivos*, *mortis causâ*, or by will, under the royal sign manual attested by two or more witnesses, although not executed according to the forms of the law of Scotland (*o*).

Assurance by trustees.

597. Trustees of any real estate or interest therein are to assure the same as the Sovereign directs under the sign manual attested by two or more witnesses (*p*).

SUB-SECT. 4—*Descent of Undisposed-of Private Estates.*

Descent of private estates.

598. Private estates undisposed of by grant, will, or otherwise under the Acts descend, on the demise of the Crown, as they would have done if the Acts had not been passed (*q*), and such lands as

(*l*) Crown Private Estate Act, 1800 (39 & 40 Geo. 3, c. 88), s. 4, as amended by the Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), s. 5. The Act of 1800 required publication of the will and attestation by three witnesses; the Act of 1862 provides that the will is to be valid if executed as stated above, but does not specifically direct attestation.

(*m*) Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), s. 5.

(*n*) Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 3, extended to Crown private estates by the Crown Private Estates Act, 1873 (36 & 37 Vict. c. 61), s. 2.

(*o*) Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), s. 6. If the instrument is *mortis causâ* it is to be valid if signed by some other person in the presence of the grantee and by his or her direction in the presence of two or more witnesses, who are to attest the same (*ibid.*).

(*p*) Crown Private Estate Act, 1800 (39 & 40 Geo. 3, c. 88), s. 4. The Acts relating to the conveyance of trust estates by infants, idiots, and lunatics are to extend to such trustees (*ibid.*). The provisions of the Trustee Act, 1852 (15 & 16 Vict. c. 55) (see now the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 51, by which the Trustee Act, 1852 (15 & 16 Vict. c. 55), is repealed and replaced, except as to lunacy in Ireland), are to apply to trustees of Crown private estates (except in Scotland) and of personal estate, and proceedings to obtain the benefit of the Act on behalf of the Crown are to be brought in the name of the person or persons authorised in writing under the sign manual (Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), s. 10). As to trustees of Crown private estates in Scotland, see *ibid.*, s. 11.

(*q*) Lands descend with the Crown and become lands held *jure coronæ* in the hands of the successor (see p. 273, *ante*).

SECT. 6. Crown Private Estates.

are fee simple are subject to all the provisions and restrictions of the recited Acts relating to Crown lands held in right of the Crown (*r*).

SUB-SECT. 5.—*Vesting of Copyholds and Leaseholds in Trustees.*

Copyholds and leaseholds.

599. Such private estates as are of copyhold, customary, or leasehold tenure in England, or such as are held feudally under a subject superior or in lease in Scotland (*s*), are directed to be vested in a trustee or trustees appointed from time to time under the sign manual in trust for the Sovereign, and the trustees are to be deemed the true and only tenants of the same, so that no lord or lady of the manor or other person may be prejudiced thereby (*t*).

SUB-SECT. 6.—*Suits Relating to Private Estates.*

Legal proceedings.

600. Suits by the Crown relating to Crown private estates not vested in trustees, wherever situate, and proceedings by the Crown relating to any debt or claim respecting the privy purse or any private personal estate subject to disposition by will, may be brought in the name or names of the person or persons appointed from time to time in writing under the sign manual (*a*); and all suits and actions respecting private estates at the suit of other parties may be sued and carried on by summons or process directed against the persons so appointed. This provision is not, however, to affect any rights and remedies competent to the Sovereign with regard to any private real or personal estate (*b*).

SUB-SECT. 7.—*Taxation of Private Estates.*

Taxes and rates.

601. Crown private estates are subject to all rates, taxes, duties, assessments, and impositions, parliamentary or parochial, in like

(*r*) Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), s. 7; Crown Private Estate Act, 1800 (39 & 40 Geo. 3, c. 88), s. 5. The Acts recited are the Crown Lands Act, 1702 (1 Ann. c. 1; stat. 1, c. 7, Ruff.); the Civil List Act, 1760 (1 Geo. 3, c. 1); and the statute 34 Geo. 3, c. 75, as to which see note (*g*), p. 274, *ante*. It would seem, therefore, that the revenues of such undisposed-of fee simple lands fall under the provisions of the Civil List Acts and form part of the national revenues along with the other hereditary revenues. As to undisposed-of personalty, see p. 277, *post*.

(*s*) The Crown may legally hold private estates in Scotland under itself as superior, and the *dominium utile* of such estates does not become consolidated with the *dominium directum*, but remains separate and private estate distinct from the right of the Crown (see the Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), s. 4, and the Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), s. 60).

(*t*) Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), ss. 3, 4; Crown Private Estate Act, 1800 (39 & 40 Geo. 3, c. 88), s. 2. It will be noticed that the vesting of customary and copyhold estates in trustees is only provided for by the Crown Private Estate Act, 1800 (39 & 40 Geo. 3, c. 88), and not by the Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), and that therefore the limited definition of "private estates" only applies (see note (*f*), p. 274, *ante*).

(*a*) Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), s. 11; Crown Private Estates Act, 1873 (36 & 37 Vict. c. 61), s. 3. The appointment is to continue during pleasure only (*ibid.*).

(*b*) Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), s. 12; Crown Private Estates Act, 1873 (36 & 37 Vict. c. 61), s. 4.

SECT. 6. Crown Private Estates.

manner as the property of any subject, and (whilst the private estates are vested in the Sovereign or in any person in trust for the Sovereign) such rates, taxes, and other charges are to be ascertained, rated, assessed, or imposed as in the case of the property of a subject. Accounts of the rates, taxes, and charges are directed to be returned to the person exercising the office of Privy Purse, and are to be paid out of the privy purse and in no other manner (*c*).

SUB-SECT. 8.—*Statutory Private Personalty.*

Personal property.

602. All personal estate consisting of moneys which may be issued or applied for the use of the privy purse, or not appropriated to any public service, or goods, chattels, or effects not coming to the Sovereign in right of the Crown, are to be deemed private estate and effects of the Sovereign, and subject to disposition by will, which, to be legally valid, must be in writing under the sign manual. Subject to such testamentary disposition, private personalty is liable to all debts properly payable out of the privy purse, and subject thereto, and as far as undisposed of, is to go, on the demise of the Crown, in the same manner as it would have done if the Crown Private Estate Act, 1800, had not been passed (*d*).

(*c*) Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), ss. 8, 9.
(*d*) Crown Private Estate Act, 1800 (39 & 40 Geo. 3, c. 88), s. 10.

CONSTRUCTION OF DEEDS.

See DEEDS AND OTHER INSTRUMENTS.

CONSULAR COURTS AND CONSULAR OFFICERS.

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CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL.

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Part I.—Contempt of Court.

SECT. 1.—*Definition.*

Kinds of contempt.

603. The contempts to be treated of herein are those of superior courts of record, represented for this purpose by the High Court of Justice (*a*). Contempt of court is either (1) criminal contempt, consisting in words or acts obstructing, or tending to obstruct, the administration of justice, or (2) contempt in procedure, consisting in disobedience to the judgments, orders, or other process of the court, and involving a private injury (*b*).

SECT. 2.—*Criminal Contempt.*

SUB-SECT. 1.—*In General.*

Jurisdiction to punish criminal contempt.

604. Criminal contempt is a misdemeanour punishable by fine or imprisonment, or by order to give security for good behaviour (*c*).

The superior courts have an inherent jurisdiction to punish criminal contempt by the summary process of attachment or

(*a*) The principles by which the High Court is guided apply to other courts, which, nevertheless, are regulated and limited by special statutory provisions as to contempts. See, *e.g.*, titles COUNTY COURTS; COURTS. As to contempt of the Crown or of Parliament, see titles CONSTITUTIONAL LAW, Vol. VI., pp. 373, 388; PARLIAMENT.

(*b*) See *Re Bahama Islands*, [1893] A. C. 138; *Seaward* v. *Paterson*, [1897] 1 Ch. 545, C. A. "Obstructing the administration of justice" is used here in a wide sense. Obstruction may be caused by disturbing the judge or attempting to influence the jury, or by keeping back or perverting the testimony of witnesses, or by other methods according to circumstances (*Ex parte Fernandez* (1861), 30 L. J. (C. P.) at p. 332). See also *R.* v. *Faulkner* (1835), 2 C. M. & R. at p. 530. The distinction between criminal contempt and contempt in procedure appears in some cases to be a narrow one ; *e.g.*, if a party to an action disobeys a prohibitory order, such disobedience, even though wilful, is contempt in procedure, whereas persons who aid and abet such disobedience, and are not parties to the action, are guilty of criminal contempt. See p. 292, *post*. The true distinction seems to be that one offender is seeking, though under a mistaken view, to enforce his rights, while the other is simply obstructing the course of justice. See *O'Shea* v. *O'Shea and Parnell* (1890), 15 P. D. 59, C. A.; *Seaward* v. *Paterson*, *supra*, at pp. 555, 558; *Re Maria Annie Davies* (1888), 21 Q. B. D. 236, at p. 238. As to contempt in procedure involving misconduct, see p. 297, *post*.

(*c*) 1 Hawk. P. C., 8th ed., chap. 6; 4 Bl. Com. 124—126. As to the power to fine, see 2 Hawk. P. C., 8th ed., chap. 1, s. 15; 4 Bl. Com. 379, 380. As to security for good behaviour, see 1 Hawk. P. C., 8th ed., chap. 28; 4 Bl. Com. 251, 252.

[The references to Blackstone in this Title are, throughout, to the first edition.]

For a modern instance of security for good behaviour in a case of contempt, see *Skipworth's Case* (1873), L. R. 9 Q. B. 230, 241.

committal (*d*) in cases where indictment or information is not calculated to serve the ends of justice. The power to attach and commit, being arbitrary and unlimited, is to be exercised with the greatest caution, and as the application of this remedy involves the withdrawal of the offence from the cognisance of a jury, it is only to be resorted to where the administration of justice would be hampered by the delay involved in pursuing the ordinary criminal process (*e*).

Characteristics of criminal contempt.

605. Criminal contempts are distinguished by the following characteristics:—No appeal lies from the order for committal or

(*d*) As to the distinction between attachment and committal, see note (*i*), p. 307, *post*. The origin of the summary jurisdiction in the common law courts is obscure, but seems to have been founded upon the contempt implied in disregarding the King's writ. See 4 Bl. Com. 287; *R.* v. *Almon* (1765), Wilm. 243, at p. 254; judgment of FLETCHER, J., in *Taaffe* v. *Downes* (decided in the Irish C. P. in 1813), at pp. 118—120 of the full report by John Hatchell referred to in 3 Moo. P. C. C. 36, n. There is a copy in the Inner Temple Library. The Court of Chancery seems to have exercised the jurisdiction by virtue of the prerogative delegated to the Chancellor (Spence's Equity (1846), p. 354).

(*e*) *Re Clements and Costa Rica* (*Republic*) v. *Erlanger* (1877), 46 L. J. (CH.) 375, at p. 383, C. A.; *R.* v. *Davies*, [1906] 1 K. B. at p. 41; *Skipworth's Case* (1873), L. R. 9 Q. B. 230, 241; and see *Powis* v. *Hunter* (1832), 2 L. J. (CH.) at p. 32. In *R.* v. *Gray*, [1900] 2 Q. B. 36, the summary procedure was adopted to punish the author of a scurrilous attack upon the presiding judge in a trial at the assizes, where the trial had come to an end before the publication took place. It has been argued that, as the publication could not affect the result of the trial, indictment would have been the appropriate procedure ("Contempt of Court and the Press," Law Quarterly Review, Vol. XVI., p. 292), but it is to be observed that the publication appeared while the assizes were pending.

For proceedings by information for libelling judges or impeding the administration of justice, see *R.* v. *Hart and White* (1808), 30 State Tr. 1131, 1193; 1 Camp. 359; *R.* v. *Watson* (1788), 2 Term Rep. 199. In a case of marrying a ward without leave, Lord THURLOW, thinking committal not sufficient punishment, recommended an information (*Schreiber* v. *Lateward* (1781), 2 Dick. 592, where earlier cases are cited). Indictment was the procedure adopted to punish an attempted rescue in court and interruption of the administration of justice (*R.* v. *Thanet* (*Earl*) (1799), 27 State Tr. 822), and in recent times an attempt to obstruct the course of justice by newspaper comments on pending criminal proceedings was punished by the same procedure (*R.* v. *Tibbits*, [1902] 1 K. B. 77, C. C. R.). See also *R.* v. *Lefroy* (1873), L. R. 8 Q. B. 134; *R.* v. *Brompton County Court Judge*, [1893] 2 Q. B. 195; and 2 Hawk. P. C., 8th ed., chap. 25, s. 4; chap. 26, s. 1. See, however, the doubt whether this offence is indictable expressed by LINDLEY and LOPES, L.JJ., in *O'Shea* v. *O'Shea and Parnell* (1890), 15 P. D. 59, at pp. 64, 65; and compare *R.* v. *Rogers* (1702) 7 Mod. Rep. 28. An assault upon a judge in the precincts of the court was made the subject of indictment (*R.* v. *Dodwell* (1878), *Times*, 16th March, p. 11, col. 3). Where a remedy by civil action is available, and no interference with the course of justice is involved, the court will refuse to commit, leaving the party to his ordinary legal remedy (*Birch* v. *Walsh* (1846), 10 I. Eq. R. 93). "Recourse ought not to be had to process of contempt, in aid of a civil remedy, where there is any other method of doing justice" (*per* MATHEW, J., in *Re Maria Annie Davies* (1888), 21 Q. B. D. 236, at p. 239). Sending a circular to customers of a business of which the court had appointed a receiver was punished by committal, but it was said that if there had been any doubt as to the meaning of the circular it might have been proper to leave the parties to their ordinary legal remedy, so that the document might be submitted to a jury (*Helmore* v. *Smith* (*No.* 2) (1886), 35 Ch. D. at p. 456, C. A.).

SECT. 2. Criminal Contempt.

attachment (*f*); privilege is not allowed (*g*); the sheriff may break open an outer door in executing the process, and perhaps may execute it on Sunday (*h*); the order of discharge from custody may be made conditional on the payment of costs (*i*). The prerogative of the Crown extends to the remission of a sentence for criminal contempt, but the Crown never interferes in the case of a contempt that is not criminal (*k*).

Position of party in contempt.

606. As a general rule a party in contempt, *i.e.*, against whom a writ of attachment has issued or an order for committal has been made (*l*), cannot make an application in the cause until he has purged his contempt, but this is subject to exceptions. Thus, a party in contempt may apply to get rid of the contempt (*m*), or to discharge an order made without jurisdiction (*n*), or to resist or set aside for irregularity any proceedings subsequent to his contempt (*o*). A party in contempt brought into court by a proceeding against him is entitled to be heard in his defence (*p*), and it seems that a plaintiff in contempt is entitled to prosecute his action if the defendant does not apply to stay the proceedings (*q*).

(*f*) *O'Shea* v. *O'Shea and Parnell* (1890), 15 P. D. 59, C. A.; and see p. 322, *post*.

(*g*) See p. 320, *post*.

(*h*) See p. 318, *post*. And see title SHERIFFS AND BAILIFFS.

(*i*) See p. 323, *post*.

(*k*) *Re Bahama Islands*, [1893] A. C. 138; *Seward* v. *Paterson*, [1897] 1 Ch. 545, at p. 559, C. A.; *Rainy* v. *Sierra Leone* (*Justices*) (1853), 8 Moo. P. C. C. 47; and see *Phipps* v. *Anglesea* (*Lord*) (1721), 1 P. Wms. 696, where it was held that contriving the marriage of a ward of court without authority was not within the exception of "contempts" from a general act of pardon. The King's pardon cannot be considered a legal discharge of an attachment for non-payment of costs or non-performance of an award etc., for though such attachment is carried on in the shape of a criminal process for a contempt of the court, yet it is in effect and substantially a civil remedy or execution for a private injury (Chitty, Prerogatives of the Crown, 90). For pardons, see also title CONSTITUTIONAL LAW, Vol. VI., p. 404.

(*l*) See Daniell, Chancery Practice, 6th ed., 906.

(*m*) Gilbert, Forum Romanum (History and Practice of Chancery), 102; *Vowles* v. *Young* (1803), 9 Ves. 172; *Anon.* (1808), 15 Ves. 174; *Wilson* v. *Bates* (1838), 3 My. & Cr. at p. 201; *Chuck* v. *Cremer* (1846), 1 Coop *temp.* Cott. 205.

(*n*) *Gordon* v. *Gordon*, [1904] P. 163, C. A.

(*o*) *Chuck* v. *Cremer*, *supra*, though the correctness of the principle has been doubted (*Gordon* v. *Gordon*, *supra*, at p. 174). Where a decree was taken *pro confesso* for want of answer, the party in contempt was entitled to notice of the proceedings under it (*King* v. *Bryant* (1838), 3 My. & Cr. 191).

(*p*) *Wilson* v. *Bates*, *supra*.

(*q*) *Ricketts* v. *Mornington* (1834), 7 Sim. 200; *Wilson* v. *Bates*, *supra*, at p. 204; *Chatterton* v. *Thomas* (1867), 36 L. J. (CH.) 592. And further, as to the disability of a party in contempt, see *Gordon* v. *Gordon*, *supra*; *Chuck* v. *Cremer*, *supra*, and the notes thereto, and Daniell, Chancery Practice, 7th ed., 724—727. See also *Re Langworthy* (1887), *Times*, 8th August, p. 3, col. 4, C. A.; where, however, no contempt had been adjudicated. Before the Judicature Acts this doctrine applied only in the Court of Chancery and in the Divorce Court (see *Garstin* v. *de Garston* (sued as *Garstin*) (1865), 34 L. J. (P. M. & A.) 45, and since those Acts, by which the right of a party to attach his opponent without an order of the court was abolished (R. S. C., Ord. 44, r. 2), the question has seldom been raised for decision.

SUB-SECT. 2.—*Contempt in the Face of the Court.*

SECT. 2. Criminal Contempt.

607. The power to fine and imprison for a contempt committed in the face of the court is a necessary incident to every court of justice (*r*). It is not from any exaggerated notion of the dignity of individuals that insults to judges are not allowed, but because there is imposed upon the court the duty of preventing *brevi manu* any attempt to interfere with the administration of justice (*s*). Insults to judges.

Contempt may be shown either by language or manner. Language which might be perfectly proper if uttered in a temperate manner may be grossly improper if uttered in a different manner (*a*).

608. A witness who refuses to be sworn or, being sworn, refuses to answer, or who prevaricates, or who remains in court after the witnesses have been ordered out of court, is guilty of contempt, and may be fined and imprisoned (*b*). If a witness declines to answer on the ground that he may criminate himself, the court must be satisfied that there is reasonable ground for him to apprehend danger (*c*). The court has declined to commit a witness for refusing to answer when his expenses had not been paid (*d*). Contempt by witnesses.

609. Misconduct in the presence of a judge at chambers or in the precincts of the court is a contempt (*e*). It is not necessary that the contempt should be in court, or that it should be a contempt Contempt at chambers.

(*r*) *R.* v. *Almon* (1765), Wilm. at p. 254. See also 2 Hawk. P. C. chap. 1, s. 15; chap. 22, s. 35; *R.* v. *Lefroy* (1873), L. R. 8 Q. B. 134.

(*s*) *Re Johnson* (1887), 20 Q. B. D. 68, C. A., *per* BOWEN, L.J., at p. 74. The following are instances of contempt in the face of the court: insulting and blasphemous remarks during a trial (*R.* v. *Davison* (1821), 4 B. & Ald. 329); open interruption of proceedings (*R.* v. *Stone* (1796), 6 Term Rep. at p. 530; *Re Bruce* (1828), Sanders, Chancery Orders, 736; *Fox* v. *Wheatley* (1893), cited in Oswald on Contempt, 2nd ed. at p. 31); seizing a document *in manibus curiæ* and carrying it away in defiance of the court (*Watt* v. *Ligertwood* (1874), L. R. 2 Sc. & Div. 361; and see *Sutherland* v. *Sutherland* (1893), *Times*, 19th April, p. 13, col. 3); a prisoner who had been acquitted threatening his fellow-prisoner in the dock for "splitting on him" (*Craddock's Case* (1875), *Times*, 18th March, p. 8, col. 3); flinging an egg at the judge in court (*Re Cosgrave* (1877), Seton, Judgments and Orders, 6th ed., 465); saying of an observation by the judge, "That is a most unjust remark" (*R.* v. *Jordan* (1888), 36 W. R. 797, C. A.); a barrister becoming party to a fraud and conducting his case so as intentionally to mislead the court (*Linwood* v. *Andrews and Moore* (1888), 58 L. T. 612). As to the obsolete punishment of cutting off the right hand for striking in court, see *R.* v. *Thanet (Earl)* (1799), 27 State Tr. 821; *Davis' Case* (1461), 2 Dyer, 188 b; *Waller's Case* (1634), Cro. Car. 373; 3 Co. Inst. 140—142.

(*a*) *Carus Wilson's Case* (1845), 7 Q. B. 984.

(*b*) 2 Hawk. P. C. chap. 22, s. 35; 4 Bl. Com. 284; *Hennegal* v. *Evance* (1806), 12 Ves. 201 (refusing to be sworn); *Ex parte Fernandez* (1861), 10 C. B. (N. S.) 3 (refusing to answer); and see *Re Maria Annie Davies* (1888), 21 Q. B. D. at p. 238; *Chandler* v. *Horne* (1842), 2 Mood. & R. 423 (remaining in court after witnesses ordered out). As to the failure of a witness to attend upon a subpœna, see p. 303, *post*. As to witnesses, generally, see title EVIDENCE.

(*c*) *R.* v. *Boyes* (1861), 1 B. & S. 311; *Re Reynolds, Ex parte Reynolds* (1882), 20 Ch. D. 294, C. A.

(*d*) *Re Working Men's Mutual Society* (1882), 21 Ch. D. 831.

(*e*) *R.* v. *Almon* (1765), Wilm. at p. 265; *Ex parte Burrows* (1803), 8 Ves. 535; *R.* v. *Wigley* (1835), 7 C. & P. 4; *Re Johnson, supra*. See also *Ex parte Wilton* (1842), 1 Dowl. (N. S.) 805; *Kirby* v. *Webb* (1887), 3 T. L. R. 763.

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of a judge sitting in court; it must be a contemptuous interference with judicial proceedings in which the judge is acting as a judicial officer (*f*).

It seems that a judge has no power to make an order at chambers committing a person for contempt done in his presence, the proper course being to bring the matter before the court (*g*).

Upon an examination before a registrar or officer of the court in the winding up of a company or before a registrar in bankruptcy, if a witness refuses to answer, the fact is reported to the judge, and thereupon the witness may be dealt with in the same manner as if he had made default in answering before the judge (*h*). If a person summoned to attend before an examiner refuses to be sworn or to answer, an order for him to be sworn or to answer must be obtained, and upon his failure to comply he can be attached (*i*).

SUB-SECT. 3.—*Speeches or Writings tending to defeat the Ends of Justice.*

Contempt out of court.

610. The issuing of attachments by the supreme courts of justice for contempts out of court is founded upon the same immemorial usage as supports the whole fabric of the common law (*k*).

Speech or writing.

Contempt by speech or writing may be by scandalising the court itself, or by abusing parties to actions, or by prejudicing mankind in favour of or against a party before the cause is heard (*l*). Any act done or writing published which is calculated to bring a court or a judge into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the court, is a contempt of court (*m*).

Attacks upon judges.

611. Scandalous attacks upon judges are punished by attachment or committal upon the principle that they are, as against the public, not the judge, an obstruction to public justice; and a libel on a judge, in order to constitute it a contempt of court, must be calculated to cause such an obstruction (*n*). The punishment is inflicted, not for the purpose of protecting either the

(*f*) *Re Johnson* (1887), 20 Q. B. D. 68, C. A., *per* Lord ESHER, M.R., at p. 71.

(*g*) *Re Johnson, supra*, at pp. 73, 74; *Re Tyrone Election Petition* (1873), 7 I. R. C. L. 242.

(*h*) Companies (Winding-up) Rules, 1903, r. 75; Bankruptcy Rules, 1886, r. 88.

(*i*) See R. S. C., Ord. 37, r. 13.

(*k*) *R.* v. *Almon* (1765), Wilm. 243, at p. 254; and see 4 Bl. Com. 285. This case has been cited and approved in numerous later cases, and the statement in the text seems to be fully established as law. It is clear, however, that in early times some forms of contempt out of court were punished, not by summary process, but in the ordinary course of law. See Law Quarterly Review, Vol. XXIV., pp. 184, 266.

(*l*) There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and to their characters, *per* Lord HARDWICKE, L.C., in *Re Read and Huggonson* (1742), 2 Atk. 469; and see *Cann* v. *Cann* (1754), 2 Ves. Sen. 520; *Re American Exchange in Europe, American Exchange in Europe* v. *Gillig* (1889), 58 L. J. (CH.) 706.

(*m*) *R.* v. *Gray*, [1900] 2 Q. B. 36, *per* Lord RUSSELL, C.J., at p. 40.

(*n*) *Re Bahama Islands*, [1893] A. C. 138, *per* BOWEN, L.J., at p. 148, P. C.; and see at p. 149. See also *R.* v. *Gray, supra*.

court as a whole or the individual judges of the court from a repetition of the attack, but of protecting the public, and especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from the mischief they will incur if the authority of the tribunal be undermined or impaired (*o*).

Private communications.

612. Every private communication to a judge for the purpose of influencing his decision upon a pending matter, and whether or not accompanied by the offer of a bribe or by personal abuse, is a contempt of court as tending to interfere with the course of justice (*p*).

Comments on pending proceedings.

613. Speeches or writings misrepresenting the proceedings of the court or prejudicing the public for or against a party are contempts. Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented, nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard (*q*). The effect of such misrepresentations may be not only to deter persons from coming forward to give evidence on one side, but to induce witnesses to give evidence on the other side alone (*r*), or to prejudice the minds of jurors (*s*).

A mere libel on the parties, not amounting to an interference with the course of justice, is not contempt of court (*t*), and in such a case the parties will be left to protect themselves by an action, though where a libel was held to be an interference with justice a fine for the contempt was imposed while an action for libel was pending (*a*).

Comments on pending proceedings, if emanating from the parties or their solicitors, are generally a more serious contempt than those coming from independent sources (*b*).

(*o*) See *R.* v. *Davies*, [1906] 1 K. B. at p. 40. It has been said that when a trial has taken place the judge is given over to criticism, and that committals for contempt by scandalising the court itself have become obsolete in this country (*per* Lord MORRIS, *McLeod* v. *St. Aubyn*, [1899] A. C. 549, at p. 561, P. C.), but this statement seems to go too far. See *R.* v. *Gray*, [1900] 2 Q. B. 36. Many earlier authorities are collected in *McLeod* v. *St. Aubyn*, *supra*.

(*p*) *Martin's Case* (1747), 2 Russ. & M. 674, n.; *Macgill's Case* (1748), 2 Fowler, Exchequer Practice (1817), 404; *R.* v. *Faulkner* (1835), 2 Cr. M. & R. 525; *Lechmere Charlton's Case* (1836), 2 My. & Cr. at p. 339; *Re Dyce Sombre* (1849), 1 Mac. & G. 116, at p. 122.

(*q*) *Per* Lord HARDWICKE, L.C., *Re Read and Huggonson* (1742), 2 Atk. 469.

(*r*) *Per* Lord LANGDALE, M.R., *Littler* v. *Thompson* (1839), 2 Beav. 129; and see *Felkin* v. *Herbert* (*Lord*) (1864), 33 L. J. (CH.) 294; *R.* v. *Gossip* (1909), *Times*, 18th February, p. 6, col. 3.

(*s*) *Skipworth's Case* (1873), L. R. 9 Q. B. 230; *R.* v. *Nield* (1909), *Times*, 27th January, p. 3, col. 1; *R.* v. *Gossip*, *supra*.

(*t*) *Re Read and Huggonson*, *supra*; *Birch* v. *Walsh* (1846), 10 I. Eq. R. 93. The authorities are reviewed in the latter case.

(*a*) *Corkery* v. *Hickson* (1876), 10 I. R. C. L. 174.

(*b*) *Re Ingles* (1740), Sanders, Chancery Orders, 552; *Smith* v. *Bond* (1845), 13 M. & W. 594; *Daw* v. *Eley* (1868), L. R. 7 Eq. 49; *Tichborne* v. *Tichborne* (1870), 39 L. J. (CH.) at p. 403; *Vernon* v. *Vernon* (1870), 40 L. J. (CH.) 118; *R.* v. *Barnardo* (1892), *Times*, 29th November, p. 13, col. 2; *Yorkshire Provident Assurance Co.* v. *Gilbert* (1894), 11 T. L. R. at p. 144; *Ilkley Local Board* v. *Oswald Lister* (1895), 11 T. L. R. 176; *Magnus* v. *Plumbers' Co.* (1899), cited in Yearly Supreme Court Practice, 1909, at p. 607.

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Although as a rule it is of the essence of the offence that the proceedings should be pending when the comments are published (*c*), it has been held a contempt to publish comments on a trial which has ended in the disagreement of the jury, rendering a new trial probable (*d*), or to publish comments after a magisterial inquiry and before the trial (*e*). The question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere, with the due course of justice (*f*). On the same principle it is a contempt to make a speech tending to influence the result of a pending trial, whether civil or criminal (*g*), or to deliver a sermon with the same tendency (*h*).

Newspaper articles.

614. It is a contempt to publish an article in a newspaper commenting on the proceedings in a pending criminal prosecution or civil action (*i*). In such cases the mischievous tendency of a trial by the newspapers when a trial by one of the regular tribunals of the country is going on is to be considered (*k*). On the other hand, the summary jurisdiction ought only to be exercised when it is probable that the publication will substantially interfere with a fair trial (*l*).

(*c*) See *Purcell* v. *McNamara* (1806), cited in the Memoirs of Sir Samuel Romilly, Vol. II., p. 166 ; *R.* v. *O'Dogherty* (1848), 5 Cox, C. C. 348 ; *Metzler* v. *Gounod* (1874), 30 L. T. 264 ; *Re Ledger* (1888), 52 J. P. 328 ; *Re De Souza* (1888), *Times*, 3rd December, p. 3, col. 3 ; *Kelly & Co.* v. *Pole* (1895), 11 T. L. R. 405 ; and see *R.* v. *Gray*, [1900] 2 Q. B. 36, and note (*e*), on p. 281, *ante*.

(*d*) *Re Labouchere, Ex parte Columbus Co., Ltd.* (1901), 17 T. L. R. 578 ; *R.* v. *Freeman's Journal*, [1902] 2 I. R. 82 ; and see *Re Martindale*, [1894] 3 Ch. 193, at p. 200.

(*e*) *R.* v. *Parke*, [1903] 2 K. B. 432.

(*f*) *Hunt* v. *Clarke* (1889), 58 L. J. (Q. B.) (C. A.) at p. 492 ; *Re Pall Mall Gazette* (1894), 11 T. L. R. 122 ; *Grimwade* v. *Cheque Bank* (1897), 13 T. L. R. 305 ; *R.* v. *Dolan*, [1907] 2 I. R. 260.

(*g*) *Onslow's and Whalley's Case* (1873), L. R. 9 Q. B. 219 ; *Skipworth's Case* (1873), L. R. 9 Q. B. 230 ; *Watt* v. *Maxim-Weston Electric Co.* (1888), 5 T. L. R. 170 ; *R.* v. *Gossip* (1909), *Times*, 18th February, p. 6, col. 3. But where the possibility that a speech might influence the jurors on a second trial was considered remote, and the Attorney-General had refused to prosecute, attachment was refused (*R.* v. *Dolan*, *supra*).

(*h*) *Re South Meath Election Petition* (1892), 30 L. R. Ir. 659 ; and see *Mackett* v. *Herne Bay Commissioners* (1876), 24 W. R. 845.

(*i*) For instances in connection with criminal prosecutions, see *R.* v. *Parnell* (1880), 14 Cox, C. C. 474 ; *R.* v. *Armstrong* (1893), *Times*, 9th May, p. 3, col. 4 ; *Re Stead*, *R.* v. *Balfour* (1895), 11 T. L. R. 492 ; *R.* v. *Tibbits*, [1902] 1 K. B. 77, C. C. R. ; *R.* v. *Parke*, *supra* ; *R.* v. *Davies*, [1906] 1 K. B. 32 ; *R.* v. *Bottomley* (1908), *Times*, 19th December ; *ibid.* (1909), 19th January. For instances in connection with civil proceedings, see *Re Crown Bank*, *Re O'Malley* (1890), 44 Ch. D. 649 (disapproved of in *R.* v. *Payne*, [1896] 1 Q. B. 577, and *Re New Gold Coast Exploration Co.*, [1901] 1 Ch. 860) ; *Re Robbins, Ex parte Green* (1891), 7 T. L. R. 411 ; *Re Montgomery Election Petition* (1892), 9 T. L. R. 93 ; *Birmingham Vinegar Brewery Co.* v. *Henry* (1894), 10 T. L. R. 586 ; *Re Finance Union* (1895), 11 T. L. R. 167 ; *Spurrell* v. *De Rechburg* (1895), 11 T. L. R. 313 ; *Re Thomas Hope Robinson, Herring* v. *British and Foreign Marine Insurance Co.* (1895), 11 T. L. R. 345 ; *Re Johnson and Mitchell, Wilson* v. *Collison* (1895), 11 T. L. R. 376 ; *Howitt* v. *Fagge* (1896), 12 T. L. R. 426 ; *Grimwade* v. *Cheque Bank*, *supra* ; *Greenwood* v. *Leather-shod Wheel Co.* (1898), 14 T. L. R. 241.

(*k*) *R.* v. *Parke*, *supra*, at p. 436 ; *Birmingham Vinegar Brewery Co.* v. *Henry*, *supra* ; *Re Finance Union*, *supra*.

(*l*) *Per* WRIGHT, J., *Re Finance Union*, *supra* ; *Re Robert Brown* (1907), *Times*,

The court discourages applications for attachment or committal where the contempt is slight (*m*), or where the applicant does not seriously press for attachment or committal, but only asks for costs (*n*).

Reflections on parties.

615. Many cases of comment on pending proceedings involve reflections on the parties, a form of contempt which the court will interfere to prevent or punish by summary process (*o*), but the court refused to interfere where such comments were made at an early stage of the proceedings, and were therefore less calculated to interfere with the course of justice (*p*).

Misrepresentations in a circular issued to shareholders with intent to mislead the court on a winding-up petition are punishable by committal (*q*).

It is a contempt to publish copies of the pleadings or evidence in a cause, while proceedings are pending (*r*), or to publish a report

7th November. In the latter case it was assumed that attachment was the only available process; but an injunction might have been granted; see p. 308, *post*. See also *Re Ehrmann* (1909), *Times*, 18th February, p. 6, col. 4.

(*m*) *Powis* v. *Hunter* (1832), 2 L. J. (CH.) 31 ; *Matthews* v. *Smith* (1844), 3 Hare, 331 ; *Re General Exchange Bank* (1866), 12 Jur. (N. S.) 465 ; *Re London Flour Co.* (1868), 16 W. R. 474 ; *Vernon* v. *Vernon* (1870), 40 L. J. (CH.) 118 ; *Buenos Ayres Gas Co.* v. *Wilde* (1880), 29 W. R. 43 ; *Hunt* v. *Clarke* (1889), 58 L. J. (Q. B.) 490, C. A. ; *Metropolitan Music Hall* v. *Lake* (1889), 58 L. J. (CH.) 513 ; *Laurence* v. *Ambery* (1891), 91 L. T. Jo. 230 ; *Re Rochester Election Petition* (1892), *Times*, 9th December, p. 14, col. 2 ; *Re Evening News and Post, ibid.; Re Pontefract Election Petition* (1893), 9 T. L. R. 430 ; *Re Martindale*, [1894] 3 Ch. 193 ; *Re Certain Newspapers, Duncan* v. *Sparling* (1894), 10 T. L. R. 353 ; *Ex parte Foster* (1894), *Times*, 5th February, p. 3, col. 5 ; *Re E. Wilson Gates and the London Congregational Union and the East London Publishing Company and the Case of R.* v. *Mead, a Metropolitan Police Magistrate* (1895), 11 T. L. R. 204 ; *Kelly & Co.* v. *Pole* (1895), 11 T. L. R. 405 ; *Fielden* v. *Sweeting* (1895), 11 T. L. R. 534 ; *R.* v. *Payne*, [1896] 1 Q. B. 577 ; *Fairclough* v. *Manchester Ship Canal Co.* (1896), 13 T. L. R. 56, C. A. ; *Re Hooley, Ex parte Hooley* (1899), 79 L. T. 706 ; *Shaw* v. *Indiarubber Mexico, Ltd.* (1900), 44 Sol. Jo. 295 ; *Re New Gold Coast Exploration Co.*, [1901] 1 Ch. 860 ; *Phillips* v. *Hess* (1902), 18 T. L. R. 400 ; *Re Townshend (Marquis)* (1906), 22 T. L. R. 341, C. A. ; *R.* v. *Daily Mail* (1907), *Times*, 15th January, p. 3, col. 2.

(*n*) *Plating Co.* v. *Farquharson* (1881), 17 Ch. D. 49, C. A.

(*o*) *Re Read and Huggonson* (1742), 2 Atk. 469 ; *Ex parte Jones* (1806), 13 Ves. 237 ; *Littler* v. *Thompson* (1839), 2 Beav. 129 ; *Paraguay (Republic)* v. *Lynch*, [1872] W. N. 48 ; *Peters* v. *Bradlaugh* (1888), 4 T. L. R. 414 ; *J. & P. Coats* v. *Chadwick*, [1894] 1 Ch. 347 ; *Russell* v. *Russell* (1894), 11 T. L. R. 38 ; *Re Stead, R.* v. *Balfour* (1895), 11 T. L. R. 492. A theatrical exhibition of the incidents of an alleged murder while the accused was awaiting his trial was held to be an offence against public justice (*R.* v. *Williams and Romney* (1823), 2 L. J. (O. S.) (K. B.) 30), but the exhibition of a model of a prisoner awaiting his trial for murder was held not to amount to contempt (*R.* v. *Gilham* (1828), 1 Mood. & M. 165).

(*p*) *Ex parte The Standard* (1907), *Times*, 28th January, p. 13, col. 3, cited in *R.* v. *Dolan*, [1907] 2 I. R. 260, 297.

(*q*) *Re Septimus Parsonage & Co.*, [1901] 2 Ch. 424.

(*r*) *Perry's Case*, cited in *Re Read and Huggonson*, *supra* (printing a brief for publication) ; *Cann* v. *Cann* (1754), 2 Ves. Sen. 520 (advertisement as to defendant's answer) ; *Tichborne* v. *Mostyn, Tichborne* v. *Tichborne* (1867), L. R. 7 Eq. 55, n. (abstract of affidavits) ; *Re Cheltenham and Swansea Railway Carriage and Wagon Co.* (1869), L. R. 8 Eq. 580 (petition to wind up) ; *Re American Exchange in Europe, American Exchange in Europe* v. *Gillig* (1889), 58 L. J. (CH.) 706 (examination of witness by liquidator) ; *Bowden* v. *Russell* (1877), 46 L. J. (CH.) 414 ; and *Re T. P. O'Connor, Chesshire* v. *Strauss* (1896), 12 T. L. R. 291 (statement of claim).

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of or comments upon proceedings which the court has directed to be held in private (*s*), but the bare result of the proceedings may be published (*t*).

It is not a contempt to publish the proceedings at a magisterial inquiry or a coroner's inquest (*a*), nor to issue a *bonâ fide* advertisement offering a reward for evidence in a pending action (*b*), or to solicit subscriptions towards the expenses of an appeal in a matter affecting the members of a trade generally (*c*); but vilifying a party under cover of an advertisement for evidence is punishable as a contempt (*d*).

SUB-SECT. 4.—*Obstructing Persons officially connected with the Court or Proceedings* (*e*).

Obstructing officers of the court.

616. Contempt by obstructing an officer of the court is punished, not for the purpose of vindicating the dignity of the court or the person of the officer, but to prevent undue interference with the administration of justice (*f*).

Disturbing the proceedings before an officer of the court is a contempt of the court whose officer he is (*g*), and so also is an attempt by threat or otherwise to induce an officer of the court to depart from the course of his duty (*h*).

Process servers.

617. Obstructing a process server in the execution of his duty is, generally speaking, a contempt of court (*i*), but slight obstruction

(*s*) *R.* v. *Clement* (1821), 4 B. & Ald. 218; *Re Martindale*, [1894] 3 Ch. 193. The High Court has an inherent jurisdiction to hear a case *in camerâ* when it is reasonably clear that justice cannot be done otherwise (*Andrew* v. *Raeburn* (1874), 9 Ch. App. 522; *Mellor* v. *Thompson* (1885), 31 Ch. D. 55, C. A.; *Badische Anilin und Soda Fabrik* v. *Levinstein* (1883), 24 Ch. D. 156; *Malan* v. *Young* (1889), 6 T. L. R. 38; *Ogle* v. *Brandling* (1831), 2 Russ. & M. 688; *D.* v. *D.*, *D.* v. *D. and G.*, [1903] P. 144).

(*t*) *Re Martindale*, *supra*; *Laurence* v. *Ambery* (1891), 91 L. T. Jo. 230.

(*a*) See *R.* v. *Parke*, [1903] 2 K. B. at p. 438, and cases there cited; and see note to *R.* v. *Fisher* (1811), 11 R. R. at p. 799.

(*b*) *Plating Co.* v. *Farquharson* (1881), 17 Ch. D. 49, C. A., disapproving of *Pool* v. *Sacheverel* (1720), 1 P. Wms. 675, where such an advertisement was held to be a contempt.

(*c*) *Plating Co.* v. *Farquharson*, *supra*.

(*d*) *Brodribb* v. *Brodribb* (1886), 11 P. D. 66; *Butler* v. *Butler* (1888), 13 P. D. 73; and see *Re Cornish*, *Staff* v. *Gill* (1893), 9 T. L. R. 196.

(*e*) As to obstructing a judge, see pp. 283, 284, *ante*.

(*f*) *Helmore* v. *Smith* (No. 2) (1886), 35 Ch. D. 449, C. A., at p. 455; *Re Johnson* (1887), 20 Q. B. D. 68, at pp. 73—75, C. A.

(*g*) See *Re Johnson*, *supra*, and *French* v. *French* (1824), 1 Hog. 138, where the earlier authorities are discussed.

(*h*) *Lechmere Charlton's Case* (1836), 2 My. & Cr. 316; and see p. 284, *ante*.

(*i*) See the following Chancery cases:—*Van* v. *Price* (1743), Dick. 91; *Williams* v. *Johns* (1773), 2 Dick. 477, and see 1 Mer. 303, n. (the process server made to eat the writ); *Ex parte Page* (1810), 17 Ves. 59; *Elliot* v. *Halmarack* (1816), 1 Mer. 302; *Emery* v. *Bowen* (1836), 5 L. J. (CH.) 349; *Price* v. *Hutchison* (1869), L. R. 9 Eq. 534. Ord. 42, r. 2, of the Consolidated Chancery Orders, 1860, making the use of violent or abusive language to a process server punishable by committal, was annulled by R. S. C. 1883, Preliminary Order and Appendix O, and no corresponding rule is substituted. See the following cases at common law:—*Anon.* (1710), 1 Salk. 84; *R.* v. *Jones* (1732), 1 Stra. 185; *R.* v. *Jermy* (1752), Say. 47; *R.* v. *Kendrick* (1754), Say. 114; *Whitworth* v. *Duncan* (1893), *Times*, 14th January, p. 11, col. 2; *Lewis* v. *Owen*, [1894] 1 Q. B. 102; and see Regulæ Trin. 17 Geo. 3.

not actually preventing service of the process will not be so regarded (*k*). The governor of a prison is not justified in refusing access to a prisoner for the purpose of serving process upon him (*l*), and a rule *nisi* for attachment was granted against the keeper of a lunatic asylum for refusing access to an inmate for the purpose of serving him with a writ (*m*).

Solicitors.

618. The court will protect its officers while discharging their duties; thus a solicitor who assaults and intimidates the opposing solicitor in passing from the judge's chambers to the outer door of the courts may be punished by committal (*n*), but an assault committed by one solicitor on another in the office of the former, upon an inspection of documents in an action, will probably not amount to a contempt (*o*).

Receivers.

619. Interference with or disturbance of a receiver appointed by the court is a contempt; and the fact that the order appointing him was improperly procured is no justification for such interference or disturbance, for application can be made to the court to test the validity of the order (*p*). Disturbance of a receiver may be caused in various ways, *e.g.* by bringing an action of ejectment against him without leave of the court that appointed him (*q*); by taking forcible possession of estates, of the rents and profits of which a receiver has been appointed (*r*); by obtaining the appointment of sequestrators of the profits of a living of which a receiver has been appointed previously (*s*); by levying an execution upon partnership assets in the possession of a receiver (*t*); by a bill of sale holder taking forcible possession of chattels in a receiver's possession (*a*); and by interfering in the management of a business in the hands of a receiver—(1) by taking the management out of his hands (*b*); (2) by sending circulars to the customers of the business (*c*); (3) by inducing employees to leave the business and take employment in a competing business (*d*).

Liquidators and sequestrators.

620. A liquidator in the winding-up of a company by the court is in the same position as a receiver appointed by the court, and it

(*k*) *Giles* v. *Vernon* (1728), 1 Barn. (K. B.) 56; *Adams* v. *Hughes* (1819), 1 Brod. & Bing. 24; *Myers* v. *Wills* (1820), 4 Moore (C. P.), 147; *Weeks* v. *Whiteley* (1835), 1 Har. & W. 218.

(*l*) *Danson* v. *Le Capelain* (1852), 7 Exch. 667. The ordinary course is to apply to the Prison Commissioners in the first instance for permission for an interview with the prisoner for the purpose of effecting service.

(*m*) *Denison* v. *Harding* (1867), 15 W. R. 346; but see R. S. C. 1883, Ord. 9, r. 5.

(*n*) *Re Johnson* (1887), 20 Q. B. D. 68, C. A.

(*o*) *Re Clements* (1877), 46 L. J. (CH.) 375, C. A.

(*p*) *Russell* v. *East Anglian Rail. Co.* (1850), 3 Mac. & G. 104.

(*q*) *Angel* v. *Smith* (1804), 9 Ves. 335; *Re Battersby's Estate* (1892), 31 L. R. Ir. 73.

(*r*) *Broad* v. *Wickham* (1831), 4 Sim. 511.

(*s*) *Hawkins* v. *Gathercole* (1852), 1 Drew. 12.

(*t*) *Lane* v. *Sterne* (1862), 3 Giff. 629.

(*a*) *Re Mead, Ex parte Cochrane* (1875), L. R. 20 Eq. 282.

(*b*) *Re Plant, Ex parte Hayward* (1881), 45 L. T. 326, C. A.

(*c*) *Helmore* v. *Smith* (No. 2) (1886), 35 Ch. D. 449, C. A.

(*d*) *Dixon* v. *Dixon*, [1904] 1 Ch. 161. In this case an injunction was granted to restrain the interference.

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is a contempt to interfere in any way with his possession of the assets without the leave of the court (*e*).

It is also a contempt to interfere with the possession of sequestrators (*f*).

Sheriffs.

621. If a sheriff returns that a person arrested or goods seized or possession of lands delivered by him by virtue of a writ are rescued or violently taken from him, the court may grant an attachment against the rescuers (*g*).

Where upon interference with a sheriff there were faults on both sides, attachment was refused (*h*), and where the evidence was conflicting the court left the sheriff's officer to bring an action for assault (*i*).

A sheriff may arrest and commit to prison any person who resists the execution of a writ (*j*).

It is contempt to move a ship in the custody of the marshal of the Admiralty Division (*k*).

Privilege.

622. The privilege from arrest formerly enjoyed by officers of the court is seldom applicable in the present state of the law, for it appears that privilege cannot be claimed in cases of criminal contempt or of contempt in procedure accompanied by misconduct, and it is only in such cases of contempt that imprisonment is inflicted (*l*).

Witnesses.

623. It is a contempt to keep a witness out of the way to avoid service of a subpœna (*m*); to intimidate a witness or a person likely to be called as a witness (*n*); to arrest a witness while attending the court to give evidence (*o*); to endeavour to influence a witness

(*e*) *Re Henry Pound, Son & Hutchins* (1889), 42 Ch. D. 402, C. A.; Companies (Winding-up) Rules, 1903, r. 78.

(*f*) *Pelham (Lord)* v. *Newcastle (Duchess)* (1712), 3 Swan. 289, n.; *Angel* v. *Smith* (1804), 9 Ves. 335.

(*g*) 2 Hawk. P. C., 8th ed., chap. 22, s. 34; *Lacon* v. *De Groat* (1893), 10 T. L. R. 24; *Re Higg's Mortgage, Goddard* v. *Higg*, [1894] W. N. 73; *Cooper* v. *Asprey* (1863), 32 L. J. (Q. B.) 209. A return of a rescue was at law equivalent to a conviction and conclusive in the proceeding in which it was made as to the truth of the facts returned, but in the Court of Chancery it was considered only as a ground for attaching the party and bringing him before the court to answer the charge (*Blackwell* v. *Tatlow* (1833), 2 My. & K at p. 329; and see *Brasyer* v. *Maclean* (1875), L. R. 6 P. C. 398, at p. 405). Formerly attachment was granted *ex parte* upon such return (*Blackwell* v. *Tatlow, supra*; *Gobby* v. *Davies* (1833), 10 Bing. 11). but now an order for attachment can only be obtained on notice (R. S. C., Ord. 44, r. 2).

(*h*) *Gregory* v. *Onslow* (1772), Lofft, 35.

(*i*) *Ex parte Lancaster (Sheriff), Ex parte Gosling* (1895), Times, 11th February, p. 3, col. 4. In this case and in *Gregory* v. *Onslow, supra*, the sheriff had not returned a rescue.

(*j*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 8 (2). And see title SHERIFFS AND BAILIFFS.

(*k*) *The Selina Stanford* (1908), *Times*, 17th November, p. 3, col. 4.

(*l*) See p. 320, *post*.

(*m*) *Clements* v. *Williams* (1836), 2 Scott, 814; *Lewis* v. *James* (1887), 3 T. L. R. 527 (injunction granted to prevent further communication with a witness).

(*n*) *Partridge* v. *Partridge* (1639) Toth. 40; *Shaw* v. *Shaw* (1861), 2 Sw. & Tr. 517; *Bromilow* v. *Phillips* (1892), 40 W. R. 220; *R.* v. *Onslow* (1873), 12 Cox, C. C. 358.

(*o*) *Cullin's Case* (1653), Sty. 395; *Vandevelde* v. *Lluellin* (1661), 1 Keb. 220; *Magnay* v. *Burt* (1843), 5 Q. B. 381, Ex. Ch.

against a party (*p*); to dismiss a servant because he has given evidence for the opposite party (*q*); to endeavour by bribery to induce a witness to suppress evidence (*r*). But the court will not grant an attachment against a party to a civil action for merely dissuading a person from giving evidence for the opposite party (*s*).

Juries.

624. The court will punish as contempt an insult offered to a juryman while performing his duty (*t*); thus the brother of a convicted prisoner who challenged the foreman of the jury to a duel immediately after the trial was committed (*a*).

Embracery, or attempting to corrupt or influence a jury, is a form of contempt punishable on indictment or information (*b*).

Counsel.

An insult to counsel may be punished as a contempt (*c*).

SUB-SECT. 5.—*Obstructing the Parties.*

Obstructing parties to proceedings.

625. Speeches or writings reflecting on parties to actions and thereby tending to obstruct the administration of justice constitute contempt (*d*). The following are instances of contempt by obstructing parties: a husband by menaces compelling his wife to put in an untrue answer (*e*); threatening a party if he allows the suit to continue (*f*); endeavouring by bribery to induce a party to suppress evidence which it is his duty to give (*g*); taking or seeking to obtain from a person suing or defending as a pauper any fee, profit, or reward for the conduct of his business in the court (*h*); retaking possession of land from a party who has recently obtained possession by a writ (*i*); preventing an infant from obeying an order of

(*p*) *Welby* v. *Still* (1892), 66 L. T. 523.

(*q*) *Bowden* v. *Universities Co-operative Association* (1881), 71 L. T. Jo. 373.

(*r*) *Re Hooley, Rucker's Case* (1898), 79 L. T. 306.

(*s*) *Schlesinger* v. *Flersheim* (1845), 2 Dow. & L. 737. The possible effect upon witnesses of speeches or writings misrepresenting the proceedings has been referred to p. 285, *ante*. The principle applied in the case of interference with witnesses is that those who have duties to perform in a court of justice are protected by the law and shielded on their way to the discharge of such duties, while discharging them, and on their return therefrom, in order that such persons may safely have resort to courts of justice (*Re Johnson* (1887), 20 Q. B. D. 68, *per* BOWEN, L.J., at p. 74, C. A.; and see p. 320, *post;* and further, as to witnesses, title EVIDENCE).

(*t*) *Ex parte Pater* (1864), 5 B. & S. 299; and see *Re Johnson*, *supra*, at p. 74.

(*a*) *R.* v. *Martin* (1848), 5 Cox, C. C. 356.

(*b*) See 1 Hawk. P. C. 8th ed., chap. 27, at p. 466; 4 Bl. Com. 140; statute 32 Hen. 8, c. 9, s. 3; Juries Act, 1825 (6 Geo. 4, c. 50), s. 61. For a modern instance, see *R.* v. *Baker* (1891), 113 C. C. Ct. Cas. 374. The misrepresentation of proceedings by speeches or writings tending to influence the minds of jurors has been referred to at p. 285, *ante*.

(*c*) *French* v. *French* (1824), 1 Hog. 138.

(*d*) See p. 284, *ante*.

(*e*) *Ex parte Haslam* (1740), 2 Atk. 50.

(*f*) *R.* v. *Carroll* (1744), 1 Wils. 75; *Smith* v. *Lakeman* (1856), 26 L. J. (CH.) 305; *Re Mulock, Ex parte Chetwynd* (1864), 10 Jur. (N. S.) 1188; *Sharland* v. *Sharland* (1885), 1 T. L. R. 492. Molesting a husband after a decree of judicial separation is not a contempt, as the function of the court ends with the decree (*Smith* v. *Smith* (1889), 59 L. J. (P.) 15).

(*g*) *Re Hooley, Rucker's Case, supra.*

(*h*) R. S. C., Ord. 16, r. 27.

(*i*) *Re Higg's Mortgage, Goddard* v. *Higg*, [1894] W. N. 73.

SECT. 2. **Criminal Contempt.**

the court (*j*); serving process upon a party while he is attending proceedings in court (*k*).

Wards of court.

626. Any interference to the prejudice of a ward of court is a contempt, *e.g.*, paying addresses to or contracting marriage with a ward without the sanction of the court or being implicated therein (*l*), removing a ward in defiance of the order of the court, or failing to comply with an order as to custody (*m*).

Lunatics.

627. It is a contempt to marry a lunatic so found (*n*), or to fail to produce an alleged lunatic pursuant to an order of the court (*o*).

Strangers to actions.

628. A stranger to the action who aids and abets the breach of a prohibitory order obstructs the course of justice, and this contempt is punishable by committal or attachment. The punishment is inflicted, not for a technical infringement of the order, but for aiding and abetting others in setting the court at defiance (*p*).

It is a contempt to indemnify a person against the consequences of committing contempt (*q*).

(*j*) *Thomas* v. *Gwynne* (1845), 8 Beav. 312.

(*k*) *Cole* v. *Hawkins* (1736), 2 Stra. 1094.

(*l*) *Eyre* v. *Shaftsbury* (*Countess*) (1722), 2 P. Wms. 102; *Goodall* v. *Harris* (1729), 2 P. Wms. 561; *Long* v. *Elways* (1729), Mos. 249; *Herbert's Case* (1731), 3 P. Wms. 116; *Brandon* v. *Knight* (1752), 2 Dick. 160; *Cox* v. *Bennett* (1874), 31 L. T. 83. In a serious case Lord ELDON ordered an indictment to be preferred (*Wade* v. *Broughton* (1814), 3 Ves. & B. 172). But where a man obtained leave to pay his addresses to a ward on his undertaking to abide by the directions of the court, and after the ward had attained twenty-one a settlement was executed in terms of which the court disapproved, the Court of Appeal refused to grant an injunction to prevent the parties from marrying, on the ground that the undertaking came to an end on the ward attaining twenty-one, and that the gentleman could not be restrained without restraining the lady, which there was no jurisdiction to do (*Bolton* v. *Bolton*, [1891] 3 Ch. 270, C. A.).

(*m*) *Long Wellesley's Case* (1831). 2 Russ. & M. 639 (showing this contempt to be criminal); *Re Witten* (1887), 4 T. L. R. 36; *G.* v. *L.*, [1891] 3 Ch. 126. See also title INFANTS AND CHILDREN.

(*n*) *Ash's* (*Mrs.*) *Case* (1702), Prec. Ch. 203.

(*o*) *Wenman's* (*Lord*) *Case* (1721), 1 P. Wms. 701. The respondent, who had been instrumental in removing the lunatic from place to place to evade his production, was committed for the contempt. See also the Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 26, and *Re B.* (*an alleged Lunatic*), [1892] 1 Ch. 459, C. A.; and title LUNATICS AND PERSONS OF UNSOUND MIND.

(*p*) *Seaward* v. *Paterson*, [1897] 1 Ch. 545, C. A. (*per* judgment of LINDLEY, L.J.); and see *Lower* v. *Crudge* (1580), Cary, 144; *Harvey* v. *Harrey* (1681), 2 Cas. in Ch. 82; *Lewes* (*Sir W.*) v. *Morgan* (1818), 5 Price, 518; *Wellesley* (*Lord*) v. *Mornington* (*Earl*) (1848), 11 Beav. 180, 181; *Avery* v. *Andrews* (1882), 51 L. J. (CH.) 414; *Smith-Barry* v. *Dawson* (1891), 27 L. R. Ir. 558. Enforcing obedience to an order against a party to an action requires mere civil process, but the deliberate act of a third person in committing a breach of an order is a contempt of a criminal nature (*Seaward* v. *Paterson*, *supra*; *Re Maria Annie Davies* (1888), 21 Q. B. D. 236; *O'Shea* v. *O'Shea and Parnell* (1890), 15 P. D. 59, C. A. Compare *Re Eede* (1890), 25 Q. B. D. 228, C. A.; and see note (*b*), p. 280, *ante*). Being a criminal offence, this form of contempt is also punishable by fine or order for security for good behaviour. See p. 317, *post*.

(*q*) *Ex parte Dixon* (1803), 8 Ves. 104.

SUB-SECT. 6.—*Forging or abusing the Process of the Court.*

SECT. 2. Criminal Contempt.

629. The forging of writs, and other deceits of the like kind tending to impose on the court, are punishable as contempts (*r*).

Abuse of process.

Abusing the process of the court is a term generally applied to a proceeding which is wanting in *bona fides* and is frivolous, vexatious, or oppressive, the ordinary remedy in such a case being to apply to strike out a pleading or stay the proceedings, or to prevent further proceedings being taken without leave (*s*). Beyond this the court has jurisdiction to punish abuse of process by committal or attachment as a contempt (*t*). Where

(*r*) 2 Hawk. P. C., 8th ed., chap. 22, s. 43; *Dag* v. *Penkevell* (1605), Moore (K. B.), 770, pl. 1064; and see *sub nom. Doydige* v. *Penkvell*, Noy, 101; *Re Hungerford and Aylmer* (1663), Sanders, Chancery Orders, 317; *Whitlock* v. *Marriot* (1686), 1 Dick. 16; *Re Hardy* (1739), Sanders, Chancery Orders, 545, 547—549; *Hale* v. *Castleman* (1746), 1 Wm. Bl. 2; *Fawcett* v. *Garford* (1789), cited in Oswald on Contempt, 2nd ed., 44; *Finnerty* v. *Smith* (1835), 1 Bing. (N. C.) 649; *Re Jacobs* (1874), *Times*, 13th June, p. 11, col. 6; and see, on this last case, 18 Sol. Jo. 642.

(*s*) See R. S. C., Ord. 25, r. 4; Vexatious Actions Act, 1896 (59 & 60 Vict. c. 51); *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210; *Grepe* v. *Loam, Bulteel* v. *Grepe* (1887), 37 Ch. D. 168, C. A.; *Reichel* v. *Magrath* (1889), 14 App. Cas. 665; *Laurance* v. *Norreys* (1890), 15 App. Cas. 210; *Remmington* v. *Scoles*, [1897] 2 Ch. 1, C. A.; *Re Alexander Chaffers, Ex parte A.-G.* (1897), 76 L. T. 351; *King* v. *Henderson*, [1898] A. C. 720, P. C.; *Stephenson* v. *Garnett*, [1898] 1 Q. B. 677, C. A.; *Re the Vexatious Actions Act* (*Re Jones*) (1902), 18 T. L. R. 476; *Kinnaird* (*Lord*) v. *Field*, [1905] 2 Ch. 306, C. A.; *Critchell* v. *London and South Western Rail. Co.*, [1907] 1 K. B. 860, C. A.; *Egbert* v. *Short*, [1907] 2 Ch. 205; *Re Norton's Settlement, Norton* v. *Norton*, [1908] 1 Ch. 471, C. A. See also title CRIMINAL LAW AND PROCEDURE.

(*t*) The following acts of abuse of process have been held punishable as contempts: taking out process without any colour of right to it; making use of process in a vexatious manner or to serve the purposes of oppression or injustice or as a device to help the jurisdiction of an inferior court; trying a feigned issue without the consent of the court (2 Hawk. P. C., 8th ed., chap. 22, ss. 39—42, 44); issuing double process for the same debt (*Anon.* (1586), Gouldsb. 30; *Higgins* v. *Sommerland* (1614), 2 Bulst. 68); making false oath as bail (*Royson's Case* (1628), Cro. Car. 146); falsely pleading infancy to delay a trial (*Lord* v. *Thornton* (1614), 2 Bulst. 67); plaintiff furnishing false particulars of address and occupation (*Smith* v. *Bond* (1845), 13 M & W. 594); bringing a fictitious action (*Coxe* v. *Phillips* (1736), Lee *temp.* Hard. 237; *Re Elsum* (1824), 3 L. J. (O. S.) (K. B.) 75); obtaining a search warrant by false pretences for the purpose of effecting an arrest in a civil action (*Anon.* (1758), 2 Keny. 372); fraudulent collusion between plaintiff and defendant to defeat the rights of a third party (*M'Gregor* v. *Barrett* (1848), 6 C. B. 262); action between highwaymen to take an account of the proceeds of robbery (*Everett* v. *Williams* (1725), 2 Pothier on Obligations by Evans, 3, n.). This case is cited by JESSEL, M.R., in *Sykes* v. *Beadon* (1879), 11 Ch. D. 170, at p. 195, by BACON, V.-C., in *Ashhurst* v. *Mason* (1875), L. R. 20 Eq. 225, at p. 230, and in Lindley on Partnership, 7th ed., 107, n., and is fully authenticated by reference to the record in Law Quarterly Review, Vol. IX., p. 197); prolixity of pleading (*Mylward* v. *Waldron* (1566), (*sub nom. Milward* v. *Welden*, Toth. 107, cited in Oswald on Contempt, 2nd ed., 43; *Anon.* (1603), Cary, 38; and see R. S. C., Ord. 2, r. 2, Ord. 19, rr. 2, 5, Ord. 38, rr. 2, 3, and Ord. 65, r. 27 (20)); obtaining payment of money as the consideration for withdrawal of a motion to commit for contempt (*R.* v. *Newton* (1903), 67 J. P. 453); a barrister wilfully deceiving the court in the conduct of a case, by procuring a party to make an affidavit he knew to be untrue, and reading the affidavit to the court (*Linwood* v. *Andrews and Moore* (1888), 58 L. T. 612). And see *Bowden* v. *Russell* (1877), 46 L. J. (CH.) 414, as to contempt in publishing a statement of claim before the hearing.

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Vexatious proceedings.

the Vexatious Actions Act, 1896 (*u*), the Rules of Court (*a*), or the inherent jurisdiction of the court to stay frivolous or vexatious proceedings (*b*) apply, committal would not now be ordered, and, on the other hand, where the irregularity amounts to an offence against justice, extending its influence beyond the parties to the action, it is a contempt of court and punishable accordingly (*c*).

Bankruptcy and winding-up.

Under the same head may be included the case of any person untruthfully stating himself to be a creditor in bankruptcy or a creditor or contributory in the winding-up of a company, offences declared by statute to be contempt of court and to be punishable accordingly (*d*).

SUB-SECT. 7.—*Breach of Duty by Persons officially connected with the Court or Proceedings.*

Contempt by solicitors.

630. Solicitors and other officers of the court are subject in a special degree to control and to punishment for any kind of contempt (*e*).

A solicitor cannot claim exemption from imprisonment for debt where the failure to pay is attended by circumstances of professional misconduct (*f*). A solicitor may be attached for breach of his undertaking (*g*). A solicitor in prison who prosecutes or defends an action or matter on behalf of a client, and a solicitor who permits a solicitor in prison to use his name for such a purpose, are punishable as for contempt (*h*).

A person acting as a solicitor in an action or matter without being duly qualified is guilty of a contempt of the court in which the proceeding is commenced, and is in addition liable to a penalty of fifty pounds (*i*), and this though he so acts with the authority of a qualified solicitor (*k*); and he is equally guilty whether he acts in his own name or in the name of another (*l*).

(*u*) 59 & 60 Vict. c. 51.

(*a*) See the rules referred to in note (*t*), p. 293, *ante*.

(*b*) See the cases cited in note (*s*), p. 293, *ante*.

(*c*) See, *e.g.*, *R.* v. *Newton* and *Linwood* v. *Andrews*, note (*s*), p. 293, *ante*.

(*d*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 16; Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63), ss. 7 (6), 15 (1). As from May 1st, 1909, Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 147 (6), 224 (2); and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 351.

(*e*) 2 Hawk. P. C., chap. 22, ss. 6—12; *Bishop* v. *Willis* (1749), 5 Beav. 83, n. It is a contempt for a solicitor to write a letter to a newspaper discussing the merits of pending proceedings in which he is engaged (*Daw* v. *Eley* (1868), L. R. 7 Eq. 49). And, generally, see title SOLICITORS.

(*f*) See the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4, and p. 301, *post*.

(*g*) See p. 306, *post*.

(*h*) Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 31.

(*i*) Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 26; *Re Webber* (1892), *Times*, 20th December, p. 14, col. 1; *Re Hall* (1893), *Times*, 12th May, p. 14, col. 2; *Re Ainsworth, Ex parte the Law Society*, [1905] 2 K. B. 103; and see Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 32; 2 Hawk. P. C., chap. 22, s. 9. See also title SOLICITORS. A law stationer who lodged a caveat in the Probate Registry on behalf of country solicitors was held not guilty of contempt (*Re Panton*, [1901] P. 239). As to the prison treatment of an offender committed under s. 32 of the Solicitors Act, 1843, see p. 319, *post*.

(*k*) *Abercrombie* v. *Jordan* (1881). 8 Q. B. D. 187, C. A.

(*l*) *Re Simmons* (1885), 15 Q. B. D. 348.

Receivers and sequestrators.

631. A receiver who fails to perform his duties may be committed or attached (*m*). A receiver is a person acting in a fiduciary capacity, and is, therefore, liable to imprisonment for failing to pay money due from him as receiver (*n*).

A sequestrator may be committed for an abuse of his powers (*o*).

Sheriffs and bailiffs.

632. A sheriff, under-sheriff, bailiff, or sheriff's officer, guilty of certain offences in the execution of his office, is punishable upon summary application, as for contempt (*p*). To constitute such an offence, there must be *mens rea* (*q*), and no person is answerable in respect thereof for the act of another (*r*). A sheriff who fails to return a writ of attachment, or bring in the body pursuant to notice, is liable to committal (*s*).

Counsel.

633. Inasmuch as counsel, though not officers of the court, have a special privilege to practise the law, they are punishable summarily for any ill practice (*a*).

(*m*) *Re Bell's Estate, Foster* v. *Bell* (1870), L. R. 9 Eq. 172; Mr. Registrar Lavie's Memorandum, [1893] 1 Ch. 259, n.

(*n*) Under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4 (3); *Re Gent, Gent-Davis* v. *Harris* (1888), 40 Ch. D. 190.

(*o*) *Pelham* (*Lord*) v. *Harley* (*Lord*) (18th century), 3 Swan. 291, n. See also *Sykes* v. *Dyson*, [1870] W. N. 81. An officer of the court who wrongfully seizes property cannot be dispossessed *brevi manu* (*Ex parte Page* (1810), 17 Ves. at p. 61).

(*p*) Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 29. The offences are—withholding a prisoner bailable after he has offered sufficient security; taking or demanding any money or reward other than the statutory fees; granting a warrant for the execution of a writ before receiving the writ; being guilty of any offence against or breach of the provisions of the Act, or of any wrongful act or neglect or default in the execution of his office, or of any contempt of any superior court (*ibid.*, s. 29 (2)). The object of these provisions is to keep sheriffs within the exact limits of their duties, to compel them to be careful and intelligent in the performance of those duties, and to make a want of care in itself an offence; but a mere innocent mistake does not make the person who commits it an offender within the meaning of s. 29 (2) (*Lee* v. *Dangar, Grant & Co.*, [1892] 2 Q. B. 337, C. A.). S. 29 of the Act, being penal, is not to be construed favourably to the party seeking to enforce the penalty (*Woolford's Estate* (*Trustee*) v. *Levy*, [1892] 1 Q. B. 772, C. A., *per* Lord ESHER, M.R., at p. 780). For instances of sheriffs being fined for contempt of a superior court, see *Re the Sheriff of Surrey* (1860), 2 F. & F. 234, 236; *Re Tichborne* (1892), *Times*, 7th December, p. 6, col. 6.

(*q*) *Lee* v. *Dangar, Grant & Co., supra*; *Shoppee* v. *Nathan & Co.*, [1892] 1 Q. B. 245; and see *Dodington* v. *Hudson* (1824), 8 Moore (C. P.), 510.

(*r*) *Bagge* v. *Whitehead*, [1892] 2 Q. B. 355, C. A.; and see *Lee* v. *Dangar, Grant & Co., supra*, and *Shoppee* v. *Nathan, supra*.

(*s*) R. S. C., Ord. 52, r. 11.

(*a*) 2 Hawk. P. C., 8th ed., chap. 22, s. 30. And see, further, title BARRISTERS, Vol. II., pp. 385, 386. The following are instances in which counsel have been punished or censured: for signing a prolix, frivolous, or scandalous pleading (*Anon.* (1603), Cary, 38; *Hickman* v. *Clarke* (1615), 2 Fowler, Exchequer Practice, 407; *Emerson* v. *Dalison* (1660), Sanders, Chancery Orders, 292—293; *Everett* v. *Williams* (1725), 2 Pothier on Obligations by Evans, 3, n. (see, as to this case, note (*t*), p. 293, *ante*); *Richardson* v. *Sutton* (1728), Cooke, Pr. Cas. 51); for scandalising the King or his government in argument before the court (*Fuller's Case* (1609), 12 Co. Rep. 41 (as to this case, see further Fuller's Church History, book 10 s. 3, pars. 29, 30)); for openly accusing the judges of oppression (*Redding's Case* (1680), T. Raym. 376); for contriving an unauthorised marriage of a ward of court (*Mitchell's Case* (1741), 2 Atk. 173); for insulting

SECT. 2. Criminal Contempt.

Jurors.

634. Jurors are liable to be fined summarily for not attending when summoned, for not answering to their names, for not appearing after being called, or for withdrawing after appearance (*b*). Jurors are liable to attachment for contempt for refusing to be sworn, for refusing to give any verdict at all, for imposing on the court, as by hustling halfpence in a hat to determine their verdict (*c*), or for separating before giving a verdict (*d*).

Any juror wilfully or corruptly consenting to embracery may be proceeded against by indictment or information and be punished by fine or imprisonment (*e*).

Gaolers.

635. Exaction or extortion by a gaoler or his officer may be punished summarily by attachment (*f*).

A gaoler who refuses to receive a prisoner committed by the High Court sitting in Bankruptcy is liable for every refusal to a fine not exceeding one hundred pounds (*g*).

Judges of inferior courts.

636. Judges of inferior courts are punishable by attachment for acting unjustly, oppressively, or irregularly, in the execution of their duty, or for disobeying writs issued by the High Court requiring them to proceed or not to proceed in matters before them (*h*), but a great part of this jurisdiction is virtually superseded by modern statutes giving the Lord Chancellor power to remove a judge of an inferior court for inability or misbehaviour (*i*).

SUB-SECT. 8.—*Contempt of Inferior Courts.*

Contempt of inferior courts.

637. The King's Bench Division has a general superintendence over all crimes whatsoever (*k*), and watches over the proceedings of

a juryman (*Ex parte Pater* (1864), 5 B. & S. 299); for addressing a letter to the chief justice of a colony reflecting on the judges (*Re Wallace* (1866), L. R. 1 P. C. 283); for wilfully deceiving the court (*Linwood* v. *Andrews and Moore* (1888), 58 L. T. 612). And see title BARRISTERS, Vol. II., p. 385.

(*b*) See Juries Act, 1825 (6 Geo. 4, c. 50), ss. 38, 51, 53—55; Juries Act, 1862 (25 & 26 Vict. c. 107), s. 12; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 186 (7), (8). See also 2 Hawk. P. C., 8th ed., chap. 22, s. 14.

(*c*) 2 Hawk. P. C., 8th ed., chap. 22, ss. 15—17; *Langdell* v. *Sutton* (1737), Barnes, 32.

(*d*) See *R.* v. *Macrae* (1892), *Times*, 19th November, where a juryman separated himself from his companions and conversed with other persons; *R.* v. *Rhoder* (1894), *Times*, 12th February, p. 6, col. 6, where a juryman was seized with sickness and rushed out of court.

(*e*) Juries Act, 1825 (6 Geo. 4, c. 50), s. 61. As to embracery, see p. 291, *ante*. See also title JURIES.

(*f*) Debtors Imprisonment Act, 1758 (32 Geo. 2, c. 28), s. 11.

(*g*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 120.

(*h*) 2 Hawk. P. C., 8th ed., chap. 22, ss. 25—29; 4 Bl. Com. 284; *R.* v. *Davies*, [1906] 1 K. B. 32, at pp. 42—44. The jurisdiction to issue attachment in such cases is assigned to the King's Bench Division (Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34). In *Munyean* v. *Wheatley* (1851), 6 Exch. 88, a writ of attachment issued against a county court judge for trying an action after a *certiorari* had issued, but, the contempt not being wilful, the attachment was to lie in the office for a month to enable the judge to comply with a second *certiorari*.

(*i*) Small Debts Act, 1845 (8 & 9 Vict. c. 127), s. 10; County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 15. See also title COUNTY COURTS.

(*k*) 2 Hawk. P. C, 8th ed., chap. 3, ss. 3, 4, and chap. 22, s. 2; 4 Bl. Com. 262; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 34.

inferior courts, not only to prevent them from exceeding their jurisdiction or otherwise acting contrary to law, but also to prevent persons from interfering with the course of justice in such courts (*l*).

The High Court will punish as contempt acts amounting to an interference with the course of justice in connection with an inquiry into a criminal offence pending before magistrates, even though it is uncertain whether the accused will, if committed, be sent for trial to the assizes or to quarter sessions (*m*).

SECT. 3.—*Contempt in Procedure.*

SUB-SECT. 1.—*In General.*

Unintentional disobedience to process.

638. Contempt in procedure (*n*) unaccompanied by circumstances of misconduct, that is, mere unintentional disobedience to a judgment, order, or process, not falling within the exceptions specified in the Debtors Act, 1869 (*o*), is a contempt in theory only, and is not punished by imprisonment (*p*), but the respondent may be ordered to pay the costs of the application (*q*).

Where misconduct involved.

In circumstances involving misconduct, contempt in procedure partakes to some extent of a criminal nature, and then bears a two-fold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the State, a penal or disciplinary jurisdiction, to be exercised by the court in the public interest (*r*). Misconduct of this kind consists in disobedience to such orders for the payment of money as are excepted from the general provisions of the Debtors Act, 1869, abolishing imprisonment for debt (*s*), or in wilful disobedience to

(*l*) *R.* v. *Parke*, [1903] 2 K. B. 432, at p. 442; *R.* v. *Davies*, [1906] 1 K. B. 32, at p. 42.

(*m*) *Ibid.* As to contempts of inferior courts punishable by those courts themselves, see titles COUNTY COURTS; COURTS.

(*n*) For definition, see p. 280, *ante*.

(*o*) 32 & 33 Vict. c. 62. See pp. 298, 301, 305, 318, *post*.

(*p*) *Shoppee* v. *Nathan*, [1892] 1 Q. B. 245, at p. 252. Casual or accidental disobedience is not sufficient; there must be a contumacious disregard of an order to justify imprisonment (*Fairclough* v. *Manchester Ship Canal Co.*, [1897] W. N. 7, C. A.; *Meters, Ltd.* v. *Metropolitan Gas Meters, Ltd.* (1907), 51 Sol. Jo. 499. And see *Bullen* v. *Ovey* (1809), 16 Ves. 141; *Leonard* v. *Attwell* (1810), 17 Ves. 385, at p. 386; *Dodington* v. *Hudson* (1824), 8 Moore (C. P.), 510; *R.* v. *Russell* (*Lord John*) *and Fox Maule* (1839), 7 Dowl. 693, at p. 696). Where attachment is allowed to issue as a process of civil execution the court will sometimes suspend the operation of the writ so as to give the party in default an opportunity of complying. If under these circumstances he fails to comply, the contempt becomes wilful, and amounts to misconduct. An exception to the general rule may occur where the party allows an order for attachment to go by default, but he would obtain an immediate discharge from prison if his contempt were free from any element of misconduct. See the cases last cited. In certain proceedings by the Crown attachment issues as of course, and the statement in the text does not apply. See title CROWN PRACTICE, and note (*l*), p. 307, *post*.

(*q*) See p. 317, *post*.

(*r*) See the remarks of LINDLEY, L.J., in *Seaward* v. *Paterson*, [1897] 1 Ch. 545, C. A., at pp. 555, 556. This distinction in contempts has an important bearing upon the mode of execution of process, privilege from arrest, and the right to appeal. See pp. 318 *et seq.*, *post*.

(*s*) See Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4. The following cases show that the object of this section is punitive or disciplinary:—*Middleton* v.

SECT. 3. Contempt in Procedure.

any order or process, or in the breach of an undertaking given to the court (*t*).

SUB-SECT. 2.—*Disobedience to Orders for the Payment of Money.*

Order for payment of money.

639. A judgment or order directing a person to pay money to another person or into court (*a*) within a limited time can be enforced, subject to the Debtors Act, 1869 (*b*), by a writ of attachment issuing under the penal jurisdiction of the court, pursuant to the last-mentioned Act and the Rules of the Supreme Court (*c*).

When the judgment is that the plaintiff do recover against the defendant a sum of money, it cannot be enforced by attachment, even though the debt be within one of the exceptions in s. 4 of the Debtors Act, 1869 (*d*).

Chichester (1871), 6 Ch. App. 152; *Marris* v. *Ingram* (1879), 13 Ch. D. 338; *Re Freston* (1883), 11 Q. B. D. 545, C. A.; *Re Gent, Gent-Davis* v. *Harris* (1888), 40 Ch. D. 190; *Re Grey*, [1892] 2 Q. B. 440, C. A.; *Re Smith, Hands* v. *Andrews*, [1893] 2 Ch. 1, C. A.; *Re Edgcome, Ex parte Edgcome*, [1902] 2 K. B. 403, C. A.; *Church's Trustee* v. *Hibbard*, [1902] 2 Ch. 784, C. A. An order for committal under s. 5 of this Act is also of a penal nature (*Mitchell* v. *Simpson* (1889), 23 Q. B. D. 373; (1890) 25 Q. B. D. 183, C. A.; *Bailey* v. *Plant*, [1901] 1 K. B. at p. 33, C. A.; *Re Edgcome, Ex parte Edgcome, supra*, at p. 410). As to the jurisdiction exercised under s. 5, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 338.

(*t*) A distinction has been drawn between process of contempt to enforce payment of a debt and the like process to enforce obedience to an order when the object is not the recovery of a debt (*Re M'Williams* (1803), 1 Sch. & Lef. at p. 174, cited in *Re Freston, supra*, at p. 553, C. A.); but it is submitted that, having regard to the Debtors Acts and R. S. C., Ord. 44, the more material question now is whether or not misconduct is to be imputed to the person who disobeys the order, be it to pay a debt, or to do some other act, or to abstain from doing anything.

(*a*) An order for payment of money into court differs from an order for payment to a person, in that the former does not necessarily imply the existence of a debt and cannot be enforced by the ordinary writs of execution, such as a *fi. fa.* Payment into court may be ordered for security or for the safety of the fund (*Re Greer, Napper* v. *Fanshawe*, [1895] 2 Ch. 217, 220; *De la Pole* (*Lady*) v. *Dick* (1885), 29 Ch. D. 351, C. A. See also *Bates* v. *Bates* (1888), 14 P. D. 17, C. A.; but see *Clarke* v. *Clarke*, [1891] P. 278; and *Hutchinson* v. *Hartmont*, [1877] W. N. 29). The effect of these decisions seems to be—(1) that an order for payment into court where the payment is not in respect of a debt is not affected by the Debtors Act, 1869 (32 & 33 Vict. c. 62), and may be enforced by attachment, like an order to do an act other than to pay money (see R. S. C., Ord. 42, r. 7); (2) that an order for payment into court where the payment is in respect of a debt is governed by s. 4 of the Debtors Act, 1869, and cannot be enforced by attachment unless the payment is within sub-ss. 3 or 4 of s. 4. See also title BANKRUPTCY AND INSOLVENCY, Vol. II., at pp. 337, 338.

(*b*) 32 & 33 Vict. c. 62. See s. 4. As to Crown debts, see note (*d*), p. 302, *post*.

(*c*) See R. S. C., Ord. 42, rr. 3, 4, 24; Ord. 44.

(*d*) *Re Oddy, Major* v. *Harness*, [1906] 1 Ch. 93, C. A.; and see *Drewitt* v. *Edwards* (1877), 26 W. R. 122, C. A.; *Hulbert and Crowe* v. *Cathcart*, [1894] 1 Q. B. 244. The direction *to pay* was the old chancery form; the direction that the plaintiff *do recover* was the common law form. Disobedience to a decree of the Court of Chancery was a contempt; at common law before the Debtors Act, 1869, imprisonment of a debtor as a means of enforcing a judgment for the recovery of money was in effect the detention of his person as security for the debt, and no contempt was implied. Originally the jurisdiction of the Court of Chancery was *in personam* only, and the attempt to enforce its decrees *in rem* by sequestration was opposed by the common law judges to the extent of holding that if sequestrators were resisted and killed it was no murder, but *se defendendo* (Gilbert, Forum Romanum, 18; *Elwayt's Case* (1623), cited 3 Swan. 280, n.). When the jurisdiction *in rem* had been established by the Court of Chancery, attachment of the

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Trustees and persons in fiduciary position.

640. Default by a trustee or person acting in a fiduciary capacity (*e*) and ordered by the High Court of Justice (*f*) to pay any sum in his possession or under his control, is punishable by attachment and imprisonment for a term not exceeding one year (*g*), but the court has a discretion to refuse the attachment (*h*).

It must be proved that the money has been actually, and not merely constructively, received by the accounting party (*i*); it is not sufficient that he has been guilty of neglect in not getting it in (*k*); but he will be treated as having in his possession money which he is proved to have received, but has never discharged himself of, although it is not in his possession at the time the order is made (*l*); and an executor will not escape liability to attachment by realising his own estate and paying his own creditors with the object of evading his indebtedness as executor (*m*).

debtor's person to enforce a decree for the payment of money was no satisfaction of the debt, but a step towards the process of sequestration which might issue against his property while he remained in prison (Braithwaite's Practice, 239; *Barnesly* v. *Powel* (1747), 2 Dick. 130; *Roberts* v. *Ball* (1855), 3 Sm. & G. 168; and see *O'Brien* v. *Lewis* (1863), 4 Giff. 396). At common law a judgment for the recovery of a debt might be enforced by imprisonment as an alternative to seizing the debtor's property, but if the former remedy were adopted the right to enforce the judgment against the property was gone (*Foster* v. *Jackson* (1614), Hob. 59; *Kinsey* v. *Yardley* (1753), 2 Dick. 265; *Roberts* v. *Ball*, *supra*, at p. 170; and see the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 16).

(*e*) The following have been held to be persons acting in a fiduciary capacity within s. 4 (3) of the Debtors Act, 1869 (32 & 33 Vict. c. 62):—An agent who received bills in order to discount them and pay the proceeds to the owner (*Hutchinson* v. *Hartmont*, [1877] W. N. 29); an auctioneer (*Crowther* v. *Elgood* (1887), 34 Ch. D. 691, C. A.); a London agent for a country solicitor (*Litchfield* v. *Jones* (1887), 36 Ch. D. 530); a receiver (*Re Gent*, *Gent-Davis* v. *Harris* (1888), 40 Ch. D. 190).

(*f*) *Marris* v. *Ingram* (1879), 13 Ch. D. 338. It is not essential that the order for payment should show that the amount is ordered to be paid by the accounting party in a fiduciary capacity. The court will inquire into the facts upon an application for attachment (*Brewster* v. *Prior* (1887), 3 T. L. R. 590; *Harper* v. *McIntyre* (1908), 52 Sol. Jo. 533). If an arrangement is made by which the terms of the order for payment are altered the right to enforce it by attachment may be lost (*Harvey* v. *Hall* (1873), L. R. 16 Eq. 324).

(*g*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4. The Act, while abolishing imprisonment for debt in the case of an honest debtor, is at the same time intended for the punishment of a fraudulent or dishonest debtor, and is in that sense vindictive (*Marris* v. *Ingram*, *supra*; and see *Middleton* v. *Chichester* (1871), 6 Ch. App. 152, C. A.; *Re Freston* (1883), 11 Q. B. D. 545, C. A.; *Re Knowles*, *Woodson* v. *Turner* (1883), 52 L. J. (CH.) 685; *Crowther* v. *Elgood* (1887), 34 Ch. D. 691, C. A.; *Re Gent*, *Gent-Davis* v. *Harris*, *supra*; *Re Smith*, *Hands* v. *Andrews*, [1893] 2 Ch. 1, C. A.; *Re Edgcome*, *Ex parte Edgcome*, [1902] 2 K. B. 403, C. A.; *Church's Trustee* v. *Hibbard*, [1902] 2 Ch. 784, C. A. See *contra*, *Barrett* v. *Hammond* (1879), 10 Ch. D. 285; *Holroyde* v. *Garnett* (1882), 20 Ch. D. 532).

(*h*) Debtors Act, 1878 (41 & 42 Vict. c. 54). Before the passing of this Act the court was bound to order imprisonment when the application was within ss. 3 or 4 of the Debtors Act, 1869 (32 & 33 Vict. c. 62) (*Marris* v. *Ingram* (1879), 13 Ch. D. 338, at p. 343; see also *Barlee* v. *Barlee* (1822), 1 Add. 301, at pp. 304, 306).

(*i*) *Re Fewster*, *Herdman* v. *Fewster*, [1901] 1 Ch. 447. A master's certificate finding a balance due is not by itself sufficient (*Re Wilkins*, *Emsley* v. *Wilkins*, [1901] W. N. 202).

(*k*) *Ferguson* v. *Ferguson* (1875), 10 Ch. App. 661, C. A.; *Re Smith*, *Hands* v. *Andrews*, *supra*.

(*l*) *Middleton* v. *Chichester* (1871), 6 Ch. App. 152, C. A.

(*m*) *Re Bourne*, *Davey* v. *Bourne*, [1906] 1 Ch. 697, C. A.

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Bankruptcy will not relieve a defaulting trustee from liability to attachment (*n*).

It is not open to a person who has failed to pay into court a sum ordered to be so paid by him as trustee, which sum by a previous order he has admitted to be in his hands, to contend that in fact he was a mere debtor and has been only constituted a trustee by the earlier order (*o*).

It is not necessary to prove fraud to render a person liable to attachment as a trustee or person acting in a fiduciary capacity (*p*).

A married woman is liable to attachment for failing to obey an order to pay into court money in her hands as legal personal representative (*q*).

An administrator under a grant which has been called in, who has been ordered to pay money to an administrator *pendente lite* (*r*), and a husband, respondent in a divorce suit, ordered to pay money by way of security for the petitioner's costs (*s*), are liable to attachment in default.

It has been said, but, it is submitted, erroneously, that default by a trustee in transferring stock pursuant to an order is within the third exception in s. 4 of the Debtors Act, 1869 (*t*).

The following have been held not to be defaults involving a liability to attachment:—failure by an executrix to obey an order for payment into court of "the proceeds of the testator's estate, the amount to be verified by affidavit" (*a*); failure by an executor to pay a debt due from him to the testator, it not being alleged that he has misappropriated any money come to his hands as executor (*b*); failure by a trustee to pay into court a specified sum, being the

(*n*) *Re Smith, Hands* v. *Andrews*, [1893] 2 Ch. 1, C. A.; *Lewes (Earl)* v. *Barnett* (1877), 6 Ch. D. 252, C. A.; and see *Re Mackintosh* (1884), 13 Q. B. D. 235.

(*o*) *Preston* v. *Etherington*, *Etherington* v. *Preston* (1887), 37 Ch. D. 104, C. A.

(*p*) *Ibid.*

(*q*) *Re Turnbull, Turnbull* v. *Nicholas*, [1900] 1 Ch. 180. The order does not create a debt, and should not direct payment out of the married woman's separate estate, but it seems that where an order is made to compel a married woman to make good a loss occasioned by *devastavit* or breach of trust the order ought to be in the form settled in *Scott* v. *Morley* (1887), 20 Q. B. D. 120, C. A. (*ibid.*).

(*r*) *Tinnuchi* v. *Smart* (1885), 10 P. D. 184.

(*s*) *Bates* v. *Bates* (1888), 14 P. D. 17, C. A.; *Shine* v. *Shine*, [1893] P. 289. But where the husband was petitioner the court refused to grant attachment (*Clarke* v. *Clarke*, [1891] P. 278).

(*t*) Oswald on Contempt, 2nd ed., 119; Morgan, Chancery Acts and Orders, 6th ed., 189. The authority cited is *Digby* v. *Turner* (1873), 21 W. R. 471; 28 L. T. 296, where JAMES, L.J., is reported to have said that non-compliance with such an order exposed the party to the terms of the general order of January, 1870, r. 7. It appears from the report of this case in [1873] W. N. 65, that the judge did not refer to r. 7, but to the order generally, and this report is probably correct, for independently of r. 7 a person could be attached for not transferring stock pursuant to an order, just as he could be for failing to do any act other than the payment of money. See r. 6 of the same general order (5 Ch. App. xxxiii.). For s. 4 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), and the exceptions referred to in the text, see title BANKRUPTCY AND INSOLVENCY, Vol. II., at p. 338.

(*a*) *Re Spicer, Spicer* v. *Spicer*, [1881] W. N. 85.

(*b*) *Re Woodward, Woodward* v. *Woodward* (1886), 30 Sol. Jo. 753; but *secus* if the debt were due from the executor in a fiduciary character to the testator (*Re Hickey, Hickey* v. *Colmer* (1886), 35 W. R. 53).

value at the date of the order of bonds which he has previously sold for a less sum (*c*); failure by an executor to pay interest with which he has been charged by the court in respect of a debt ordered to be paid by him in that capacity (*d*); failure by a trustee to pay a debt incurred in carrying on a testator's business (*e*); failure to pay a sum received from a bankrupt by way of fraudulent preference (*f*); failure by a partner to pay to a receiver a sum received on account of the partnership (*g*); failure to pay the costs of contempt (*h*); failure by a solicitor, afterwards appointed a trustee, to repay a sum received by him as commission on effecting policies on the life of his client (*i*); failure to pay maintenance pursuant to an order by consent embodied in a final decree for dissolution of marriage (*k*).

Default by solicitor.

641. Default by a solicitor in payment of costs when ordered to pay them for professional misconduct, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order, is punishable by attachment and imprisonment for a term not exceeding one year (*l*), but the court has a discretion to refuse the attachment (*m*). In these cases the contempt consists in the breach of duty by the solicitor in his office, as distinct from his legal liability to pay, and a common law judgment for the recovery of the amount due is no bar to a subsequent proceeding for payment under the disciplinary jurisdiction (*n*).

The following are contempts of this description: default in payment of a balance due under the common order to tax and ordered to be paid to the client (*o*), even though the defaulter has ceased to be a solicitor (*p*); default in payment of costs of an action brought without authority (*q*); default in payment of debt or costs when the solicitor is ordered to pay a sum of money with costs in his character of solicitor (*r*). Acceptance of part of a sum ordered to

(*c*) *Cronin* v. *Twinberrow*, [1887] W. N. 201; and see *Re Walker*, *Walker* v. *Walker* (1890), 38 W. R. 766.

(*d*) *Middleton* v. *Chichester* (1871), 6 Ch. App. 152, C. A.; *Re Hickey*, *Hickey* v. *Colmer* (1886), 35 W. R. 53.

(*e*) *Re Firmin*, *London and County Banking Co.* v. *Firmin* (1887), 57 L. T. 45.

(*f*) *Re Chapman and Shaw*, *Ex parte Wood* (1872), 21 W. R. 71.

(*g*) *Piddocke* v. *Burt*, [1894] 1 Ch. 343.

(*h*) *Re Hind*, *Ex parte Sharp* (1877), 37 L. T. 168; *Jackson* v. *Mawby* (1875), 1 Ch. D. 86; *Micklethwaite* v. *Fletcher* (1879), 27 W. R. 793; *Tilney* v. *Stansfeld* (1880), 28 W. R. 582; *Re Greer*, *Napper* v. *Fanshawe*, [1895] 2 Ch. at p. 222. As to the costs on an order for discharge from custody, see p 324, *post*.

(*i*) *Re Berwick* (*Lord*), *Berwick* (*Lord*) v. *Lane* (1900), 81 L. T. 722, 797, C. A.

(*k*) *De Lossy* v. *De Lossy* (1890), 15 P. D. 115.

(*l*) Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4 (4). The same principles apply as in the case of a defaulting trustee. See note (*g*), p. 299, *ante*.

(*m*) Debtors Act, 1878 (41 & 42 Vict. c. 54).

(*n*) *Re Grey*, [1892] 2 Q. B. 440, C. A.; and see *Re Wray* (*a Solicitor*) (1887), 36 Ch. D. 138, C. A.; *Re Edye* (1891), 39 W. R. 198; *Re Simes*, *Simes* v. *Newbery* (1890), 38 W. R. 570.

(*o*) *Re White* (*a Solicitor*) (1870), 19 W. R. 39; *Re Dudley* (1883), 12 Q. B. D. 44, C. A.

(*p*) *Re Strong* (1886), 32 Ch. D. 342, C. A.

(*q*) *Jenkyns* v. *Fereday* (1872), L. R. 7 C. P. 358.

(*r*) *Re a Solicitor*, [1895] 2 Ch. 66.

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be paid is not a waiver so as to preclude subsequent attachment upon a writ issued previously to such acceptance (*a*).

Payment of costs by a solicitor as an unsuccessful litigant is not enforceable by attachment (*b*).

A person acting as a solicitor, though unqualified, is liable to attachment for default in payment in the same manner as he would have been if qualified (*c*).

Crown debts.

642. The payment of Crown debts may be enforced by attachment (*d*).

SUB-SECT. 3.—*Disobedience to Orders other than for the Payment of Money, and to other Process.*

Disobedience to orders other than for the payment of money.

643. Wilful disobedience to a judgment or order requiring a person to do any act other than the payment of money, or to abstain from doing anything, is a contempt of court punishable by attachment or committal (*e*). Thus, a party who fails to comply with an order to answer interrogatories, or for discovery, or for inspection of documents, is liable to attachment (*f*),

(*a*) *Re Fereday*, [1895] 2 Ch. 437.

(*b*) *Re Hope* (1872), 7 Ch. App. 523, C. A.; *Farley* v. *Buckler* (1893), *Times*, 30th October. Whether a solicitor ordered to repay part of his costs because, having regard to the amount of assets, the taxation should have been on a lower scale, and also ordered to pay the costs of the application, can be attached in default of payment of the latter costs, *quære* (*Re Apelt, Ex parte Byrne* (1889), 6 Morr. 102).

(*c*) *Re Hulm and Lewis*, [1892] 2 Q. B. 261.

(*d*) The Crown not being named in the Debtors Act, 1869 (32 & 33 Vict. c. 62), is not bound thereby (*A.-G.* v. *Edmunds* (1870), 22 L. T. 667; *Re Smith* (1876), 2 Ex. D. 47). As to committal under s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 338.

(*e*) R. S. C., Ord. 42, rr. 7, 24; and see p. 297, *ante*. In the Court of Chancery a man was attached for neglecting to do an act ordered to be done and committed for doing a prohibited act (*Callow* v. *Young* (1887), 56 L. J. (CH.) 690; and see Practical Register in Chancery (1714), p. 100). Attachment and committal are now alternative remedies, whether the order to be enforced is mandatory or prohibitory (*Harvey* v. *Harvey* (1884), 26 Ch. D. at p. 654; *D.* v. *A. & Co.*, [1900] 1 Ch. at p. 488). Committal as distinguished from attachment is discussed under Part II., sect. 1, p. 307, *post*. As to what amounts to wilful disobedience, see *Dodington* v. *Hudson* (1824), 8 Moore (C. P.), 510; *Re Bennetts, Ex parte Malachy* (1834), 1 Mont. & A. 257; *R.* v. *Hemsworth* (1846), 3 C. B. 745; *Harding* v. *Tingey* (1864), 12 W. R. 684; *Spokes* v. *Banbury Board of Health* (1865), L. R. 1 Eq. 42; *Rantzen* v. *Rothschild* (1865), 14 W. R. 96; *Harvey* v. *Harvey* (1884), 26 Ch. D. at p. 654; *Lewis* v. *Pontypridd, Caerphilly and Newport Rail. Co.* (1895), 11 T. L. R. 203, C. A.; *Fairclough* v. *Manchester Ship Canal Co.*, [1897] W. N. 7, C. A.; *R.* v. *Leicester Guardians* 1899), 81 L. T. 559; *D.* v. *A. & Co.*, [1900] 1 Ch. at p. 488; *R.* v. *Worcester Corporation* (1904), 68 J. P. 130; *Same* v. *Same* (1905), 3 L. G. R. 468; *Goatley* v. *Jones* (1906), 50 Sol. Jo. 724. See also *R.* v. *Daye*, [1908] 2 K. B. 333, where the disobedience was held to be not wilful; but the attachment was to lie in the office, and only issue if the disobedience were persisted in and so became wilful. Disobedience to a prohibitory order is not always wilful, and when it is not the court will suspend the operation of the order for a time (*A.-G.* v. *Colney Hatch Lunatic Asylum* (1868), 4 Ch. App 146; and see *Day* v. *Longhurst* (1893), 62 L. J. (CH.) 334).

(*f*) R. S. C., Ord. 31, r. 21. This is in fact disobedience to an order requiring a person to do an act. Compare Ord. 42, rr. 7, 24. As to the right of a plaintiff to attach his co-plaintiff for failing to comply with an order for discovery obtained by the defendant, see *Seal and Edgelow* v. *Kingston*, [1908] 2 K. B. 579, C. A.

but attachment will issue only where the failure to comply is wilful (*g*).

Any judgment or order against a corporation which is wilfully disobeyed may by leave of the court be enforced by attachment against the directors or other officers thereof (*h*).

Failure to comply with an award of arbitration made on a submission in writing is a contempt of court, and may be punished by attachment in certain cases (*i*).

If a mandamus or mandatory order be not complied with, the court may, besides or instead of proceedings for contempt, direct the act to be done by some person appointed for that purpose (*k*).

Non-parties.

644. A person not a party to a cause or matter, who obtains an order or in whose favour an order is made, is entitled to enforce obedience to it by the same process as if he were a party; and a person not a party against whom any judgment or order may be enforced is liable to the same process for enforcing obedience to it as if he were a party (*l*).

Orders improperly obtained.

645. The fact that an order ought not to have been made is not a sufficient excuse for disobeying it. The party aggrieved should apply to the court for relief (*m*). Upon an application to enforce an order irregularly made the court will give the respondent the benefit of the fact that the order is irregular (*n*).

Recovery of chattels.

646. A judgment for the recovery of property other than land or money may be enforced by attachment (*o*).

Disobedience to subpœnas.

647. Failure to attend under a *subpœna ad testificandum* or a *subpœna duces tecum*, if wilful, is punishable by attachment (*p*), which should be applied for at the earliest opportunity (*q*). A clear case must be shown (*r*), and full conduct money must have been

(*g*) See note (*e*), p. 302, *ante;* and see *Wilson* v. *Raffalovitch* (1881), 7 Q. B. D. 553, C. A., at p. 561; *Gay* v. *Hancock* (1887), 56 L. T. 726.

(*h*) R. S. C., Ord. 42, r. 31. As to what is wilful disobedience, see note (*e*), p. 302, *ante*.

(*i*) See title ARBITRATION, Vol. I., p. 474.

(*k*) R. S. C., Ord. 42, r. 30.

(*l*) *Ibid.*, r. 26.

(*m*) *Woodward* v. *Lincoln* (*Earl*) (1674), 3 Swan. 626; *Drewry* v. *Thacker* (1819), 3 Swan. 529, at p. 546; *Fennings* v. *Humphrey* (1841), 4 Beav. 1; *Blake* v. *Blake* (1844), 7 Beav. 514; *Chuck* v. *Cremer* (1846), 2 Ph. 113.

(*n*) *Drewry* v. *Thacker*, *supra*.

(*o*) R. S. C., Ord. 42, r. 6. In practice a judgment in this form is never enforced by attachment. If such a mode of procedure is available it would seem to involve the necessity for an order to deliver the property within a specified time before the application for attachment is made (Ord. 41, r. 5).

(*p*) 4 Bl. Com. 284; *Scholes* v. *Hilton* (1842), 10 M. & W. 15; *R.* v. *Russell* (*Lord John*) *and Fox Maule* (1839), 7 Dowl. at p. 696; *Jackson* v. *Seager* (1844), 2 Dow. & L. 13; *R.* v. *Daye*, [1908] 2 K. B. 333 (as to which, see note (*e*), p. 302, *ante*). Attachment was refused where the witness had been excused from attending by the solicitor for the party on whose behalf the subpœna was issued (*Farrah* v. *Kent* (1838), 6 Dowl. 470; *R.* v. *Sloman* (1832), 1 Dowl. 618). Illness is a sufficient excuse for non-attendance (*Re Jacobs* (1835), 1 Har. & W. 123). The King's Bench Division has an inherent jurisdiction to set aside a *subpœna ad test.* (*R.* v. *Baines*, [1909] 1 K. B. 258). As to other contempts by a witness, see p. 283, *ante*.

(*q*) *R.* v. *Stretch* (1835), 4 Dowl. 30.

(*r*) *Horne* v. *Smith* (1815), 6 Taunt. 9; *Garden* v. *Cresswell* (1837), 2 M. & W. 319.

SECT. 3. **Contempt in Procedure.**

tendered with the subpœna (*s*). It is a contempt for a witness not to attend even though the cause is not called on (*t*), and a witness is liable to attachment though not called, if it is shown that by reason of his absence he could not have appeared if called (*a*). A witness must bring with him documents specified in a *subpœna duces tecum*, even though he is not bound to produce them (*b*).

Attendance before officers of the court.

Witnesses may by order be subpœnaed to attend before an official or special referee or before an arbitrator or umpire (*c*). Any party to a cause may subpœna a witness to attend before an officer of the court or other person appointed to take the examination of witnesses; and upon a certificate of the examiner that a witness has refused to attend, or to be sworn, or to answer, an order may be made directing him to comply (*d*), and wilful disobedience to such order by the witness is a contempt (*e*). Witnesses summoned to attend before a Chancery master are liable in default to process of contempt in like manner as witnesses are liable thereto in case of disobedience to any order of the court, or in case of default in attendance in pursuance of any order of the court or of any writ of *subpœna ad testificandum* (*f*). An order of a master in lunacy for the attendance of an alleged lunatic for examination may be enforced in the same way as an order of a judge of the High Court (*g*).

Attachment will issue for disobedience to a subpœna to name a solicitor in the place of one who is dead or disqualified (*h*).

Habeas corpus.

648. Attachment will issue for disobedience to a writ of *habeas corpus* by the person to whom it is directed (*i*).

Bankruptcy.

649. Analogous to contempt by wilful disobedience to a judgment, order, or process, are certain defaults declared to be contempts by

(*s*) *Fuller* v. *Prentice* (1788), 1 Hy. Bl. 49; *Brocas* v. *Lloyd* (1856), 23 Beav. 129; *Re Working Men's Mutual Society* (1882), 21 Ch. D. 831. Objection to the insufficiency of conduct money should be taken at the time of service (*Goff* v. *Mills* (1844), 13 L. J. (Q. B.) 227; *Dixon* v. *Lee* (1834), 1 Cr. M & R. 645). Failure to attend for cross-examination pursuant to an order will not be punished by attachment where conduct money has not been tendered (*In the Estate of Harvey*, [1907] P. 239; *Townend* v. *Townend* (1905), 93 L. T. 680).

(*t*) *Barrow* v. *Humphreys* (1820), 3 B. & Ald. 598.

(*a*) *Dixon* v. *Lee*, *supra*; *Goff* v. *Mills*, *supra*.

(*b*) *R.* v. *Carey* (1845), 2 New Sess. Cas. 105.

(*c*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 18.

(*d*) R. S. C., Ord. 37, rr. 13, 20. An order for attachment of a witness summoned to attend before an officer of the court can only be made by the court itself. See p. 315, *post*.

(*e*) R. S. C., Ord. 37, r. 8; *Stuart* v. *Balkis Co.* (1884), 53 L. J. (CH.) 791; *Carew* v. *Carew*, [1891] P. 360; *Shurrock* v. *Lillie* (1888), 4 T. L. R. 355.

(*f*) R. S. C., Ord. 55, rr. 16, 17. For form of Chancery master's summons for the attendance of a witness, see *ibid.*, r. 24, and Form 1 in Appendix L to the R. S. C. To enforce attendance under this summons an order for the witness to attend must be obtained under Ord. 37, r. 13, followed in case of non-attendance by a motion for attachment (*Powell* v. *Nevitt* (1887), 55 L. T. 728).

(*g*) Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 26 (2).

(*h*) See Daniell, Chancery Forms, 5th ed., p. 1041.

(*i*) Crown Office Rules, 1906, r. 221; *Re Thompson*, *R.* v. *Woodward* (1889), 5 T. L. R. 565, 601. Where the original writ of *habeas corpus* was not served, but only copies, a rule *nisi* for attachment was discharged (*R.* v. *Rowe* (1894), 11 T. L. R. 29). And see title CROWN PRACTICE.

the Bankruptcy Acts. A debtor who fails to attend the first meeting of creditors and give information required, or to give an inventory of his property and a list of creditors and debtors, or to wait on the trustee, or to execute deeds etc., or to aid in the realisation and distribution of his property, or to deliver possession of any part of his property, is guilty of contempt (*k*). Any treasurer or other officer or any banker, attorney, or agent of a bankrupt who fails to pay and deliver to the trustee any money and securities for which he is responsible, is guilty of contempt (*l*). Where default is made by a trustee, debtor, or other person, in obeying any order or direction of the Board of Trade or the Official Receiver under any power conferred by the Bankruptcy Act, 1883, the court may order compliance, and may also make an immediate order for committal (*m*). Disobedience to an order of the court made on an application to enforce the provisions of a composition or scheme is a contempt (*n*), and a discharged bankrupt who fails to assist the trustee in realising and distributing such property as is vested in the trustee is guilty of contempt (*o*).

Charity Commissioners.

Every person from whom the Charity Commissioners or their inspector is authorised to require any account or statement or answers to any questions or inquiries, or whose attendance the inspector is authorised to require, who refuses or wilfully neglects to render such account or statement, or to answer such questions or inquiries, or to attend in obedience to a lawful precept of the inspector, or to give evidence before him, or wilfully alters, destroys, withholds, or refuses to produce any document lawfully required to be produced before the inspector or the Commissioners, is deemed guilty of a contempt of court and is liable to be attached and committed by the High Court of Justice on summary application by the Commissioners (*p*).

SUB-SECT. 4.—*Breach of Undertaking.*

Breach of undertaking.

650. The breach of an undertaking given to the court by a person or corporation, pending proceedings, on the faith of which the court sanctions a particular course of action or inaction, is misconduct amounting to contempt.

An undertaking to pay money to a person or into court, like an order for payment, can only be enforced by process leading to imprisonment, subject to the provisions of the Debtors Acts, 1869 and 1878 (*q*).

(*k*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 24.
(*l*) *Ibid.*, s. 50 (6).
(*m*) *Ibid.*, s. 102 (5).
(*n*) Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 3 (14).
(*o*) *Ibid.*, s. 8 (8). And see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 267.
(*p*) Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 14; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 76; and see 18 & 19 Vict. c. 124, ss. 6—9. For form of order adjudicating the contempt, see *Re Sir Robert Peel's School at Tamworth, Ex parte Charity Commissioners* (1868), 3 Ch. App. 543; *Re Gilchrist Educational Trust*, [1895] 1 Ch. 367; and see title CHARITIES, Vol. IV., p. 302.
(*q*) 32 & 33 Vict. c. 62, s. 4; 41 & 42 Vict. c. 54; *Carter* v. *Roberts*, [1903] 2 Ch. 312; *Buckley* v. *Crawford*, [1893] 1 Q. B. 105; *Re Launder*, *Launder* v. *Richards*, [1908] W. N. 49. But see note (*a*), p. 298, *ante*. It seems that the correct process is committal (*D.* v. *A. & Co.*, [1900] 1 Ch. 484).

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An undertaking to do any act other than the payment of money or to abstain from doing anything is enforced by committal (*r*).

An undertaking given in court by a company cannot be enforced by attachment of the directors (*s*).

An undertaking given in court on behalf of a person without his knowledge and not communicated to him will not be enforced by process of contempt (*t*).

Breach of undertaking.

Applying to Parliament for powers which involve contravening an undertaking given to the court does not amount to a contempt, but the parties should inform the court of their intention to apply to Parliament (*u*).

A wife who molests her husband in breach of her undertaking to the court is liable to committal (*a*).

A solicitor failing to enter an appearance in an action, or to put in bail in an Admiralty action *in rem*, in pursuance of his written undertaking, is liable to attachment (*b*), and only under very special circumstances will the court relieve a solicitor from his undertaking (*c*). In the same class may be included neglect of a solicitor, without reasonable cause, to give notice to his client of an order for interrogatories, discovery, or inspection, which renders the solicitor liable to attachment (*d*).

A solicitor is liable to attachment for breach of any undertaking given by him in his capacity of an officer of the court (*e*), but not for an undertaking given in his private capacity, unless given to the court (*f*).

(*r*) *D.* v. *A. & Co.*, [1900] 1 Ch. 484; *Callow* v. *Young* (1887), 56 L. T. 147.

(*s*) *A.-G.* v. *Wheatley & Co., Ltd.* (1903), 48 Sol. Jo. 116; and see R. S. C., Ord. 42, r. 31. Such an undertaking may be enforced by sequestration under the last-mentioned rule, being equivalent to an order for the purpose of that rule (*Milburn* v. *Newton Colliery, Ltd.* (1908), 52 Sol. Jo. 317).

(*t*) *Turner* v. *Naval, Military and Civil Service Co-operative Society of South Africa* (1907), *Times*, 21st January, p. 3, col. 2. Compare R. S. C., Ord. 31, rr. 22, 23.

(*u*) *A.-G.* v. *Boyle* (1864), 10 Jur. (N. S.) 309.

(*a*) *Linton* v. *Mackenzie* (1893), *Times*, 31st October, p. 14, col. 1. The report says "attachment," but the record shows that the order was for committal, and it was necessarily so, as the sentence was imprisonment for a fixed period.

(*b*) R. S. C., Ord. 12, r. 18. A solicitor must fulfil his undertaking notwithstanding instructions from his client not to do so (*Re Kerly, Son & Verden*, [1901] 1 Ch. 467, C. A.; and see *The Anna and Bertha* (1891), 64 L. T. 332); but where it appeared that the plaintiff's attorney had agreed not to enforce the undertaking, attachment was refused (*Mould* v. *Roberts* (1824), 4 Dow. & Ry. (K. B.) 719). Notice to enter an appearance should be given to the defendant's solicitor before applying to attach him for breach of his undertaking (*Jacob* v. *Magnay* (1842), 12 L. J. (Q. B.) 93).

(*c*) *Re Kerly, Son & Verden, supra.*

(*d*) R. S. C., Ord. 31, r. 23. This is not the breach of an undertaking, unless one be implied, but it is an obvious breach of duty which places the client in danger of attachment; for service of such an order on the solicitor is sufficient to found an application for attachment of the party for disobedience to the order (r. 22).

(*e*) *Re Coolgardie Gold Fields, Ltd., Re Cannon, Son & Morten* (*Solicitors*), [1900] 1 Ch. 475 (undertaking to stamp a document); *Re the Solicitor of a Defendant, Lawford* v. *Spicer* (1856), 2 Jur. (N. S.) 564 (undertaking not to interfere with a witness). As to what is necessary to constitute an undertaking by a solicitor, see *Re a Solicitor, Ex parte Hales*, [1907] 2 K. B. 539. An undertaking by a solicitor in his professional capacity, though not given in an action, will be enforced by a summary order made in the matter of the solicitor (*ibid.*; *Re F. C.*, [1888] W. N. 77).

(*f*) *Ex parte Watts* (1832), 1 Dowl. 512; *Ex parte Evans* (1840), 9 Dowl 106. And see, generally, title SOLICITORS.

Part II.—Attachment and Committal.

SECT. 1.—*In General.*

SECT. 1. In General. Definitions.

651. Attachment (*g*) and committal are summary processes for punishing criminal contempts (*h*), and also modes of execution for enforcing judgments and orders (*i*).

A writ of attachment commands the sheriff to attach a person and bring him before the court touching a contempt alleged, and has the same effect as the writ of attachment formerly issued by the Court of Chancery (*k*).

No writ of attachment can be issued without leave of the court or a judge, to be applied for on notice to the party affected (*l*). An

(*g*) The attachment referred to is the writ of attachment, a personal process, having no connection with attachment of debts, which is by order, and not by writ. See R. S. C., Ord. 45.

(*h*) As to the distinction between criminal and other contempts, see p. 280, *ante*.

(*i*) See R. S. C., Ord. 42, r. 8. The origin of committal, as distinguished from attachment, is to be found in the practice of the Court of Chancery. Where attachment issued the offender was arrested by the sheriff, and, if the contempt required to be adjudicated, was brought before the court, examined upon interrogatories, and upon proof of the contempt was committed to the Fleet (Lord Bacon's Ordinances, 1619, No. 77). In cases of assaulting or abusing a process server or speaking scandalous words of the court, an order was made for immediate committal upon *ex parte* motion, supported by an affidavit of the facts (*ibid.*), and upon contempt in the face of the court an order for committal was made *instanter*, as at present. At one time attachment followed by interrogatories was applied upon the breach of an injunction, but the later practice, which is still followed, was to serve the accused with a notice of motion for committal and to decide the question upon affidavits on both sides (*Angerstein* v. *Hunt* (1801), 6 Ves. 488; Eden on Injunctions, 75, 76). Attachment only issued against a party, whereas a stranger was committed (*Re Bell's Estate*, *Foster* v. *Bell* (1870), L. R. 9 Eq. 172. See, however, *Louis* v. *Goldingham* (1650), Sanders, Chancery Orders, 246, 247. See also *Re O'Reillys* (*Minors*) (1828), 2 Hog. 20). All the above contempts were "special." In the case of "ordinary" contempts, namely, where a defendant made default in entering an appearance, or in putting in an answer, or in complying with an order to do an act, the plaintiff could attach him upon proof of the default without any order. Committal was never bailable (*Buist* v. *Bridge* (1880), 29 W. R. 117); attachment on mesne process was bailable, but attachment by way of execution was not (*Rowley* v. *Ridley* (1784), 2 Dick. 623). And see p. 316, *post*.

(*k*) R. S. C., Ord. 44, r. 1; Rules of 1875, Ord. 44, r. 1. For form of writ, see R. S. C., Appendix H, No. 12.

(*l*) R. S. C., Ord. 44, r. 2. By virtue of this rule no suitor now has the power to imprison his adversary without first obtaining an order of the court, and there is secured to the respondent an opportunity of being heard in his defence in every case. This reform, as applied in the case of disobedience to an order requiring an act to be done other than the payment of money, may be considered as a complement to the Debtors Act, 1869 (32 & 33 Vict. c. 62), whereby, subject to exceptions, imprisonment for default in the payment of money was abolished; for, though the rules prescribe attachment as a remedy in case of such disobedience, imprisonment is not inflicted in cases of mere disobedience unaccompanied by misconduct. See p. 297, *ante*. At common law before the Judicature Acts a writ of attachment never issued without the leave of the court, but in Chancery a plaintiff could without any order attach a defendant for disobedience to an order to do an act and could keep him in prison until he complied. Ord. 44 governs the practice in all divisions of the High Court except in

SECT. 1. In General.

application for attachment should be made promptly; otherwise the court may refuse to attach (*m*).

An order for committal is made upon motion to the court, notice of which must be served on the person sought to be committed (*n*).

When applicable.

652. Attachment is applicable to all cases of contempt, except breaches of undertakings (*o*) and failure by a sheriff to return a writ of attachment or bring in the body after notice (*p*). In the excepted cases committal is applicable, and committal is an alternative to attachment in all cases of criminal contempt (*q*) and for the purpose of enforcing judgments and orders to do an act other than the payment of money or to abstain from doing anything (*r*).

Instead of ordering attachment or committal, the court sometimes adopts the more lenient course of granting an injunction against a repetition of the act of contempt (*s*).

Practice.

653. Attachment and committal as penal processes in the case of criminal contempt are not generally affected by the Rules of the Supreme Court, and the practice in such cases in most respects remains the same as before the Judicature Acts (*t*).

On the Crown side of the King's Bench Division proceedings for contempt are regulated by the Crown Office Rules, 1906 (*u*).

Decrees and orders in matrimonial causes are enforced and put

matrimonial causes, as to which see note (*a*), p. 309, *post*, and except also in certain Crown cases governed by the Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), and the Crown Suits etc. Act, 1865 (28 & 29 Vict. c. 104), and rules thereunder. See title CROWN PRACTICE.

(*m*) This was the rule at common law (*Thorpe* v. *Gisbourne* (1825), 11 Moore (C. P.), 55; *R.* v. *Stretch* (1835), 4 Dowl. 30; *Storey* v. *Garry* (1840), 8 Dowl. 299).

(*n*) For immediate committal for contempt in face of the court, see p. 317, *post*.

(*o*) *D.* v. *A. & Co.*, [1900] 1 Ch. 484.

(*p*) R. S. C., Ord. 52, r. 11. Formerly the sheriff was attached by the coroners, and the coroners by elisors. See *Andrews* v. *Sharp* (1773), 2 Wm. Bl. 911. It would seem that under the present rule the sheriff would be arrested by the tipstaff. See p. 318, *post*.

(*q*) Mr. Registrar Lavie's Memorandum, [1893] 1 Ch. 259, n. As to criminal contempt, see Part I., sects. 1 and 2, pp. 280 *et seq.*, *ante*.

(*r*) R. S. C., Ord. 42, rr. 7, 24; *Harvey* v. *Harvey* (1884), 26 Ch. D. 644; *D.* v. *A. & Co.*, *supra*. Attachment, and not committal, is (subject to the Debtors Acts) the procedure to enforce an order for the payment of money (*Re Ward's Estate*, *Wallis* v. *Ward*, [1871] W. N. 163; R. S. C., Ord. 42, rr. 3, 4, 24).

(*s*) See *Brook* v. *Evans* (1860), 29 L. J. (CH.) 616, C. A.; *Coleman* v. *West Hartlepool Rail. Co.* (1860), 8 W. R. 734; *Plimpton* v. *Spiller* (1876), 4 Ch. D. 286, C. A.; *Mackett* v. *Herne Bay Commissioners* (1876), 24 W. R. 845; *Bowden* v. *Russell* (1877), 46 L. J. (CH.) 414; *Kitcat* v. *Sharp* (1882), 52 L. J. (CH.) 134; *Guilding* v. *Morel Brothers*, *Cobbett & Sons* (1888), 4 T. L. R. 198; *Cronmire* v. *Daily Bourse* (1892), 9 T. L. R. 101; *J. & P. Coats* v. *Chadwick*, [1894] 1 Ch. 347.

(*t*) R. S. C., Ord. 68, r. 1. The only alteration seems to be that Ord. 42, r. 2, of the Consolidated Chancery Orders, 1860, providing for the punishment by committal of violence or abusive language to a process server or scandalous or contemptuous words against the court or the process thereof, is annulled (R. S. C., Preliminary Order and Appendix O). But see p. 288, *ante*.

(*u*) Rr. 240—242. See pp. 309 *et seq.*, *post*.

in execution in the same or the like manner as judgments, orders, and decrees in Chancery (*a*).

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654. The writ of sequestration, though a process of contempt in its nature (*b*), is a form of civil execution, and is not applicable to criminal contempt. This process is not, as formerly, dependent upon the previous issue of a writ of attachment (*c*), but when attachment has already issued, sequestration will not issue without the leave of the court (*d*).

Sequestration.

SECT. 2.—*Form of the Application.*

SUB-SECT. 1.—*Chancery Division.*

655. Application for leave to issue a writ of attachment is ordinarily made by motion to the court (*e*).

Motion for attachment.

In the case of acts by a stranger tending to obstruct the course of justice, the notice of motion should be entitled "In the matter of an application on behalf of A. B. for a writ of attachment [*or* committal] for contempt of court" etc., as well as in the action, if any (*f*).

The notice of motion must state in general terms the grounds of the application (*g*).

Application for committal is made by motion to the court, and if the person sought to be committed is a stranger, the notice of motion should be entitled as in the case of attachment (*h*). A notice of motion to commit a solicitor for breach of an undertaking given in an action should be entitled, not in the action, but in the matter of the solicitor (*i*). It is proper to state in the notice of motion the grounds of the application, though the rule does not apply in terms to a motion for committal (*k*).

Motion for committal.

Except in cases where committal is the exclusive remedy (*l*), attachment may be asked for in the alternative.

(*a*) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 52. It seems that this section, though repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), still governs the practice. See s. 1 of the latter Act; *Favard* v. *Favard* (1896), 75 L. T. 664; *Townend* v. *Townend* (1905), 93 L. T. 680, C. A.; *Robins* v. *Robins*, [1907] W. N. 90. In the Divorce Court attachment never issued without an order (Divorce Rules, 1865, r. 110). A judge of the King's Bench Division has no power to order attachment to enforce payment of costs ordered to be paid in a divorce suit (*Cook* v. *Cook* (1885), 2 T. L. R. 10).

(*b*) *Pratt* v *Inman* (1889), 43 Ch. D. 175, at p. 179.

(*c*) R. S. C., Ord. 42, r. 8; *ibid.*, rr. 4, 6, 31; Ord. 43, rr. 6, 7.

(*d*) Daniell, Chancery Practice, 7th ed., 713. As to sequestration, see title PRACTICE AND PROCEDURE. As to committal under s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 338.

(*e*) NORTH, J., considered it was better to apply by summons, which could be adjourned into court if it were a proper case for granting leave (*Davis* v. *Gulmoye* (1889), 40 Ch. D. 355), but this practice has not been followed. In any case the order for leave will not be made in chambers (S. C. (1888), 39 Ch. D. 322, C. A.).

(*f*) See *O'Shea* v. *O'Shea and Parnell* (1890), 15 P. D. 59, C. A., at p. 62, where the full title of the application is given.

(*g*) R. S. C., Ord. 52, r. 4.

(*h*) See *supra*.

(*i*) *Re Kerly, Son & Verden*, [1901] 1 Ch. 467, C. A.

(*k*) See R. S. C., Ord. 52, r. 4.

(*l*) See p. 308, *ante*.

SECT. 2. SUB-SECT. 2.—*King's Bench Division.*

Form of the Application.

Summons or motion.

656. The practice upon applications for attachment and committal on the civil side of the King's Bench Division is governed by the same rules as in the Chancery Division, but applications on the civil side to enforce obedience to orders are made by summons to a judge at chambers (*m*). Attachment is the usual remedy for breach of an order to do an act, and committal for the breach of a prohibitory order (*n*). Other contempts are dealt with by motion to a divisional court, which must be made by counsel, and cannot be made by a litigant in person who is not a barrister (*o*). No application for a rule *nisi* for an order to show cause against attachment can be made on the civil side (*p*).

Unless it is otherwise directed, an application on the Crown side for attachment for contempt is by motion for an order *nisi* (*q*). In some cases the accused is called upon by order to appear and answer (*r*).

An application for committal for contempt in bankruptcy or in matrimonial proceedings must be made in court (*a*), and the same practice applies in probate and admiralty cases and in the winding up of companies (*b*).

Where a motion to commit has been refused, the court will not entertain a second motion upon further evidence in respect of the same contempt (*c*).

A notice of motion for attachment or committal must be addressed to individuals. If it is addressed to a corporation no order will be made (*d*).

SECT. 3.—*Evidence and Procedure.*

Affidavit in support.

657. To found an application for committal or attachment in the case of criminal contempt, the facts constituting the alleged contempt must be proved by affidavit (*e*).

(*m*) As to the jurisdiction to make the order in chambers, see *Salm Kyrburg* v. *Posnanski* (1884), 13 Q. B. D. 218; *Amstell* v. *Lesser* (1885), 16 Q. B. D. 187, though it has been said that applications affecting public liberty should, if possible, be heard in public (*per* Lord LOREBURN, L.C., *R.* v. *Governor of Brixton Prison, Ex parte Lapierre* (1906), *Times*, 7th August, p. 6, col. 1; and see *West Ham Corporation* v. *Cunningham* (1906), *Times*, 16th August, p. 5, col. 4).

(*n*) This follows the old Chancery practice (see Mr. Registrar Lavie's Memorandum, [1893] 1 Ch. 259, n.), but either remedy is applicable (*Harvey* v. *Harvey* (1884), 26 Ch. D. 644; *D.* v. *A. & Co.*, [1900] 1 Ch. 484). Formerly an order for committal was made by a judge at chambers to punish a contempt committed in his presence, the judge afterwards reporting the fact to the court, but such orders are now invariably made in open court.

(*o*) *Ex parte Fenn* (1834), 2 Dowl. 527.

(*p*) R. S. C., Ord. 52, r. 2.

(*q*) Notwithstanding a note to the contrary in *R.* v. *Gray*, [1900] 2 Q. B. 36, at p. 42. See Crown Office Rules, 1906, r. 240; and see for instances *R.* v. *Parke*, [1903] 2 K. B. 432; *R.* v. *Davies*, [1906] 1 K. B. 32.

(*r*) This procedure, though not specifically provided for by the rules, was adopted after consideration of precedents in *Onslow and Whalley's Case* (1873), L. R. 9 Q. B. 219. See also *R.* v. *Gray*, *supra*.

(*a*) Bankruptcy Rules, 1886, r. 6; Divorce Rules, 110.

(*b*) As to winding-up proceedings, see Companies (Winding-up) Rules, 1903, r. 5.

(*c*) *Badische Anilin und Soda Fabrik* v. *Thompson* (1904), 21 R. P. C. 469, C. A.

(*d*) *Re Hooley, Ex parte Hooley* (1899), 79 L. T. 706.

(*e*) R. S. C., Ord. 38, r. 1. The person sought to be committed has the right

To enforce obedience to a judgment, order, or process by attachment or committal, it is necessary to prove by affidavit—(1) service of the judgment, order, or process to be enforced; (2) default made; (3) service of the summons or notice of motion for attachment or committal (when the respondent fails to appear on the hearing of the application).

When the application is to enforce a judgment or order for the payment of money, including an order embodying an undertaking to pay, the affidavit must prove that the case is within subss. 3 or 4 of s. 4 of the Debtors Act, 1869 (*f*).

Service of order.

658. Personal service of the order (*g*) or process to be enforced is essential, except in the following cases: (1) prohibitory orders the drawing up of which is not completed; (2) orders embodying an undertaking to do an act by a day named; (3) orders to answer interrogatories or for discovery or inspection of documents; (4) where an order for substituted service has been made; (5) where the respondent has evaded service of the order (*h*).

In the case of service of a prohibitory order pronounced, but not yet drawn up, it is sufficient to prove that the person affected has had notice of its being made (*i*), but formal service of the completed order should be effected as soon as possible (*k*). A prohibitory order does not require indorsement under Ord. 41, r. 5 (*l*).

to see the applicant's evidence in reply (*Dodge* v. *Brown* (1879), 24 Sol. Jo. 108). In the case of a juryman charged with misconduct it was held that the evidence of his brother jurymen was inadmissible (*R.* v. *Andrew Brown* (1907), New South Wales State Rep. 290); but see *Ex parte Morris* (1907), 72 J. P. 5. The report of a registrar in bankruptcy that a witness has refused to be sworn is sufficient evidence to support an application for committal without any affidavit (*Re a Debtor, Ex parte Petitioning Creditors and the Debtor* (1907), *Times*, 14th May, p. 3, col. 2).

(*f*) 32 & 33 Vict. c. 62. Where the judgment or order directs payment within so many days after service, there is no default until after service and the expiration of the period fixed (*Colverson* v. *Bloomfield* (1885), 29 Ch. D. 341, C. A.). And see Ord. 41, r. 5.

(*g*) "Order" includes judgment for the purpose of this and the following sections.

(*h*) As to (5), see *Kistler* v. *Tettmar*, [1905] 1 K. B. 39, C. A., and the remarks thereon, note (*b*), p. 313, *post*. Where a person sought to be attached appeared by counsel and by consent the application to show cause was adjourned, it was held, on his failing to appear subsequently, that he had waived personal service of the rule *nisi* (*Ex parte Alcock* (1875), 1 C. P. D. 68).

(*i*) *United Telephone Co.* v. *Dale* (1884), 25 Ch. D. 778; and see *Re Bishop, Ex parte Langley* (1879), 13 Ch. D., at p. 119, C. A. See also *Skip* v. *Harwood* (1747), 3 Atk. 564; *Anon.*, 3 Atk. 567; *Hearn* v. *Tennant* (1807), 14 Ves. 136; *Kimpton* v. *Eve* (1813), 2 Ves. & B. 249, at p. 350. So also notice of a warrant of arrest of a ship is sufficient without formal service (*The Seraglio* (1885), 10 P. D. 120).

(*k*) *James* v. *Downes* (1812), 18 Ves. 522; *Van Sandau* v. *Rose* (1820), 2 Jac. & W. 264.

(*l*) *Selous* v. *Croydon Rural Sanitary Authority* (1885), 53 L. T. 209; *Hudson* v. *Walker* (1891), 64 L. J. (CH.) 204. Ord. 41, r. 5, requires the copy of the judgment or order directing an act to be done, which shall be served upon the person required to obey the same, to be indorsed with a memorandum in the words or to the effect following, namely, "If you the within-named A. B. neglect to obey this judgment [*or* order] by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment [*or* order]."

SECT. 3. **Evidence and Procedure.**

A mandatory injunction in the prohibitory form formerly in common use (*m*) can be enforced by obtaining a supplemental order fixing a time for compliance, and then moving for attachment or committal upon proof of personal service of both orders, the supplemental order being indorsed as required by Ord. 41, r. 5 (*n*).

Service of order.

An undertaking embodied in an order to do an act by a day therein named may be enforced by committal without serving the order (*o*), but where the undertaking is to do an act forthwith, there must either be personal service of the order under Ord. 41, r. 5, or a four-day order must be obtained and served personally before attachment will issue (*p*). Where the undertaking is to pay money into court, and no time is named in the order, or the day fixed by the order is past, a four-day order must be obtained and served personally before the undertaking can be enforced (*q*).

Where an order by consent to do an act by a day named has not been personally served, an order to enlarge the time can only be obtained by consent (*r*).

An order against two executors to pay money into court can be enforced by attachment against one of them who has been served with the order, without serving the order upon the other (*s*).

Service of an order for interrogatories, or discovery, or inspection made against any party, on his solicitor, is sufficient to found an application for an attachment of the party for disobedience to the order (*t*).

(*m*) Before the decision in *Jackson* v. *Normanby Brick Co.*, [1899] 1 Ch. 438, C. A. Before this decision a mandatory injunction, *e.g.*, to pull down and remove buildings, restrained the defendant from allowing the buildings to remain on the land. Now the order directs the defendant to pull down and remove etc. Before the Judicature Acts an order directing an act to be done could be enforced by attachment, which issued at the instance of the plaintiff without any order, but an injunction could only be enforced by committal, which could only be effected pursuant to an order of the court. Thus the court reserved to itself the power of enforcing or declining to enforce a mandatory injunction. As attachment now never issues without an order (Ord. 44, r. 2), the indirect form of mandatory injunction is no longer necessary.

(*n*) *Mansell* v. *Jones*, [1905] W. N. 168, C. A.; and see *Angerstein* v. *Hunt* (1801), 6 Ves. 488. If a supplemental order simply extends the time for doing an act, it does not require indorsement under Ord. 41, r. 5, provided the first order is so indorsed (*Treherne* v. *Dale* (1884), 27 Ch. D. 66, C. A.), but it must be personally served (*Re Seal* (*a Solicitor*), *Re Seal and Edgelow* (*Solicitors*), [1903] 1 Ch. 87). For form of indorsement, see note (*l*), p. 311, *ante*.

(*o*) *D.* v. *A. & Co.*, [1900] 1 Ch. 484; *Re Launder*, *Launder* v. *Richards* (1908), 98 L. T. 554.

(*p*) *Halford* v. *Hardy* (1899), 81 L. T. 721. A direction in an order to do an act forthwith is a sufficient expression of time under Ord. 41, r. 5 (*Halford* v. *Hardy*, *supra*; and see *Thomas* v. *Nokes* (1868), L. R. 6 Eq. 521; *contra*, *Gilbert* v. *Endean* (1878), 9 Ch. D. 259, C. A., at p. 266. See also *Higgins* v. —— (1803), 8 Ves. 381).

(*q*) *Carter* v. *Roberts*, [1903] 2 Ch. 312, 321. The four-day order is obtained on summons, and requires the act to be done within four days after service of the order.

(*r*) *Australasian Automatic Weighing Machine Co.* v. *Walter*, [1891] W. N. 170.

(*s*) *Re Ellis*, *Hardcastle* v. *Ellis* (1906), 95 L. T. 80.

(*t*) R. S. C., Ord. 31, r. 22. In the Chancery Division the order, if drawn up in chambers, can be enforced by attachment without being entered (Ord. 62, r. 2 (1)).

Upon an affidavit showing sufficient grounds for the application an order for substituted service of the order to be enforced may be obtained *ex parte* (*a*).

Personal service of an order to do an act may be dispensed with if it is shown that the person to be served has evaded service (*b*).

The fact that the person ordered to do an act was actually in court when the order was made is not a ground for dispensing with personal service of the order (*c*).

Service of order.

An order extending the time for doing an act ordered to be done must be served personally (*d*), and this applies to a four-day order.

The original or duplicate order to be enforced, order extending time, or four-day order must be produced at the time of service, production of an office copy not being sufficient (*e*).

The copy for service of an order directing an act to be done must be indorsed in the prescribed manner (*f*).

Personal service of an order upon a director of a company must be proved before he can be attached under Ord. 42, r. 31 (*g*).

To found an application for attachment to enforce the order of an Irish court enrolled in the Chancery Division in England, the order must have been served in Ireland (*h*).

(*a*) R. S. C., Ord. 67, r. 6; Ord. 10; *Re a Solicitor*, [1892] W. N. 22; *Whyte Melville* v. *Whyte Melville* (1888), 4 T. L. R. 491. For early cases of substituted service, see *Skegg* v. *Simpson* (1848), 2 De G. & Sm. 454.

(*b*) *Kistler* v. *Tettmar*, [1905] 1 K. B. 39, C. A., decided on the authority of *Hyde* v. *Hyde* (1888), 13 P. D. 166, C. A. The latter decision is partly founded on *Allen* v. *Allen* (1885), 10 P. D. 187, which is founded on *Miller* v. *Miller* (1870), L. R. 2 P. & D. 54, the judgment in which last case does not refer to the question whether personal service is necessary. It is submitted that the practice of the Court of Chancery on which the decision in *Hyde* v. *Hyde*, *supra*, purports to be based is not correctly stated in that case. In the Court of Chancery personal service was required unless there had been a previous order for substituted service: see Braithwaite's Practice, 166, 167, 358, note (b); Morgan, Chancery Acts and Orders, 4th ed., 489, 490; Seton, Judgments and Orders, 4th ed., 1560; Daniell, Chancery Practice, 4th ed., 939, 940. Braithwaite says (p. 358, note (b)): "The service *must* be personal on the party, or, if substituted service, then in strict accordance with the terms of the order directing such service." See also *Re Cunningham* (1886), 55 L. T. 766, as to the later practice. The same practice was followed at common law (*R.* v. *Smithies* (1789), 3 Term Rep. 351; *Stunnell* v. *Tower* (1834), 1 Cr. M. & R. 88; *Parker* v. *Burgess* (1834), 3 Nev. & M. (K. B.) 36; *Phillips* v. *Hutchinson* (1835), 3 Dowl. 583; *Albin* v. *Toomer* (1835), *ibid.* 563; *Swinfen* v. *Swinfen* (1856), 25 L. J. (C. P.) 303). But see, *contra*, *Dicas* v. *Warne* (1835), 1 Scott, 537; *Ex parte Burgin* (1841), 1 Dowl. (N. S.) 292.

(*c*) *Re Tuck*, *March* v. *Lousemore*, [1906] 1 Ch. 692, C. A., dissenting from the *dictum* of COTTON, L.J., to the contrary in *Hyde* v. *Hyde*, *supra*.

(*d*) *Re Seal* (*a Solicitor*), *Re Seal and Edgelow* (*Solicitors*), [1903] 1 Ch. 87. An error in the title of the copy served entitles a person attached thereunder to his discharge (*Re Holt* (*an Infant*) (1879), 11 Ch. D. 168).

(*e*) See R. S. C., Ord. 67, r. 1; Ord. 62, r. 2 (2). There is a slip in Ord. 67, r. 1, which refers to "an order for attachment" instead of "an order to be enforced by attachment." An order for attachment is never served. Where it was shown that the defendant was aware of the contents of an order, committal to enforce it was ordered, although the original was not produced to him when he was served with a copy (*Pettitt* v. *Bell* (1908), 52 Sol. Jo. 784).

(*f*) R. S. C., Ord. 41, r. 5. See *Stockton Football Co.* v. *Gaston*, [1895] 1 Q. B. 453. For indorsement, see note (*l*), p. 311, *ante*.

(*g*) *McKeown* v. *Joint Stock Institute*, [1899] 1 Ch. 671.

(*h*) *Re Synge* (1901), 85 L. T. 736, C. A.

SECT. 3. Evidence and Procedure.

659. Process such as a *subpœna ad testificandum* must, as a general rule, be served personally (*i*), but substituted service has been allowed (*k*).

Proof of default.

660. The proof required of default in complying with an order depends upon the circumstances of the case. Disobedience to a prohibitory order necessarily involves a more elaborate statement of the facts than disobedience to an order to do an act. If the default consists in failure to pay money into court, a certificate of non-payment must be obtained from the paymaster (*l*).

Service of notice.

661. Notice of the application for leave to issue a writ of attachment must be served on the person against whom the attachment is to be issued (*m*). The notice of motion or summons must be served personally, except in cases where before the Judicature Acts attachment would have issued without an order (*i.e.*, under the present practice, in case of failure to obey an order to do an act), in which case service at the address for service is sufficient (*n*).

Where a defendant, sought to be attached for disobedience to an order to do an act, has not entered an appearance, it is as a general rule sufficient to file a notice of motion or summons for attachment (*o*), but the court may require personal service in such a case where there is no difficulty in effecting it (*p*).

An order for substituted service of the notice of motion or summons will be made *ex parte* upon an affidavit showing sufficient grounds for the application (*q*), except on the Crown side of the King's Bench Division, where the rule is strict in requiring personal service (*r*).

A copy of any affidavit intended to be used and, so far as reasonably necessary, of the exhibits, must be served with the notice of motion or summons for attachment (*s*).

(*i*) R. S. C., Ord. 37, r. 32; *Spicer* v. *Dawson* (1856), 22 Beav. 282.

(*k*) *Dyson* v. *Foster*, 7th February, 1908, *per* JELF, J., in chambers, unreported. Substituted service of a subpœna to name a solicitor has been allowed (*Hamilton* v. *Thomas*, [1883] W. N. 31. Compare *Newenham* v. *Pemberton* (1845), 1 Holt (EQ.), 52, and note; *Holcombe* v. *Trotter* (1845), 1 Holt (EQ.), 55). Disobedience to a subpœna cannot be enforced by attachment unless the original is produced at the time of service (*Wadsworth* v. *Marshall* (1832), 1 Cr. & M. 87; *R.* v. *Wood* (1832), 1 Dowl. 509; *Garden* v. *Creswell* (1837), 2 M. & W. 319; *Pitcher* v. *King* (1845), 2 Dow. & L. 755); and the copy must not vary materially from the original (*Doe* d. *Clarke* v. *Thomson* (1841), 9 Dowl. 948).

(*l*) See Daniell, Chancery Practice, 7th ed., 705; Supreme Court Funds Rules, 1905, r. 100. The necessity for strict evidence of non-payment may be waived by the conduct of the party in default (*Treherne* v. *Dale* (1884), 27 Ch. D. 66, C. A.).

(*m*) R. S. C., Ord. 44, r. 2.

(*n*) *Browning* v. *Sabin* (1877), 5 Ch. D. 511; *Re a Solicitor* (1880), 14 Ch. D. 152; *Callow* v. *Young* (1886), 55 L. T. 543; *Petty* v. *Daniel* (1886), 34 Ch. D. 172; *Re Evans, Evans* v. *Noton*, [1893] 1 Ch. 252, C. A.

(*o*) R. S. C., Ord. 67, r. 4; *Re Morris, Morris* v. *Fowler* (1890), 44 Ch. D. 151; *Re Evans, Evans* v. *Noton*, *supra*.

(*p*) *Re Bassett, Bassett* v. *Bassett*, [1894] 3 Ch. 179.

(*q*) R. S. C., Ord. 67, r. 6; Ord. 10.

(*r*) See Crown Office Rules, 1906, r. 240.

(*s*) R. S. C., Ord. 52, r. 4; and see *Mackenzie* v. *Mackenzie* (1852), 21 L. J. (CH.) 386; *Litchfield* v. *Jones* (1883), 25 Ch. D. 64; *Hampden* v. *Wallis* (1884), 26 Ch. D. 746, C. A.; *Petty* v. *Daniel* (1886), 34 Ch. D. 172; *Re Hutchings*, [1887]

Notice of motion for committal must be served personally on the person sought to be committed (*a*), unless an order for substituted service has been obtained (*b*).

Copies of the affidavits and exhibits should be served with a notice of motion for committal, as in the case of attachment (*c*).

Orders have been made *ex parte* at the same time for attachment and committal of the same person for breach of an undertaking and disobedience to a prohibitory order (*d*).

Contempt in face of the court.

662. In cases of contempt in the face of the court the offender may be committed *instanter*, and no notice is necessary (*e*), but the contempt must be distinctly stated, and an opportunity of answering given (*f*).

SECT. 4.—*Order for Attachment or Committal.*

Order must be made by court or judge.

663. An order for attachment or committal cannot be made by an official or special referee, arbitrator, master, or registrar in bankruptcy (*g*). A master in lunacy can make an order for attachment in certain cases, but it is considered better that under ordinary circumstances he should refer the application to the court (*h*).

Preferably the order should show on the face of it the nature of

W. N. 254; *Taylor* v. *Roe* (1893), 68 L. T. 213; *Re a Solicitor*, [1893] W. N. 188; *Re Dunning*, *Sturgeon* v. *Lawrence* (1894), 63 L. J. (CH.) 784; *Rendell* v. *Grundy*, [1895] 1 Q. B. 16, C. A.; *Hall* v. *Trigg*, [1897] 2 Ch. 219; *Carter* v. *Roberts*, [1903] 2 Ch. 312.

(*a*) *Ellerton* v. *Thirsk* (1820), 1 Jac. & W. 376; *Nelson* v. *Worssam*, [1890] W. N. 216; *Mander* v. *Falcke*, [1891] 3 Ch. 488. In cases under the Bankruptcy Acts see Bankruptcy Rules, 1886, rr. 85—88.

(*b*) *Mander* v. *Falcke*, *supra*; *Re a Solicitor*, [1892] W. N. 22.

(*c*) See R. S. C., Ord. 52, r. 4, and *Carter* v. *Roberts*, *supra*. The rule does not in terms apply to a motion for committal, but the practice applicable to attachment is followed.

(*d*) *Gordon* v. *Gordon*, [1903] P. 141; and see S. C., [1904] P. 163, C. A., as to the facts. It is clear that both processes could not be effectually pursued at once (see p. 318, *post*), and this seems to be the only instance of attachment and committal being ordered simultaneously. The orders were made *ex parte* on the authority of *Favard* v. *Favard* (1896), 75 L. T. 664 (divorce). In the latter case an order for attachment was made *ex parte*, and without service of the order to be enforced (which was evaded) on the suggestion that, according to the practice of the Court of Chancery, a person who failed to obey an order to do an act might be attached without any notice at all. But, in fact, in such a case the Court of Chancery was strict in requiring proof of personal service, or substituted service if an order for that purpose were previously obtained (see note (*b*), p. 313, *ante*), of the order to be enforced, before attachment issued; and the copy order served required to be indorsed, "If you the within-named" etc., under General Order, January, 1870, r. 1, and previously under Consolidated Chancery Orders, 1860, 23, r. 10. On the other hand, if the attachment issued in *Favard* v. *Favard*, *supra*, for breach of the prohibitory part of the order, then, according to the practice of the Court of Chancery, an order for leave to issue the attachment was required, and could only be obtained on notice. See Mr. Registrar Lavie's Memorandum, [1893] 1 Ch. 259, n. In the Court of Chancery an order for committal was never made *ex parte*.

(*e*) *Watt* v. *Ligertwood* (1874), L. R. 2 Sc. & Div. 361.

(*f*) *Re Pollard* (1868), L. R. 2 P. C. 106; *Chang Hang Sin* v. *The Judges of the Supreme Court of Hong Kong* (1909), 25 T. L. R. 381.

(*g*) R. S. C., Ord. 36, rr. 51, 52A, 55C; Ord. 54, r. 12 (a); Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 99.

(*h*) *Re B.* (*an alleged Lunatic*), [1892] 1 Ch. at p. 463, C. A.

SECT. 4. Order for Attachment or Committal.

the contempt, though the absence of this information does not invalidate the order (*i*).

Effect of order.

664. In the Chancery Division and on the civil side of the King's Bench Division an order for attachment is virtually a sentence for an uncertain term of imprisonment, the person arrested being conveyed to prison by the sheriff and remaining there (subject to s. 4 of the Debtors Act, 1869 (*k*), in case of default in the payment of a debt) until the court authorises his discharge (*l*).

Procedure on the Crown side.

665. When attachment issues on the Crown side of the King's Bench Division, if the sheriff returns *cepi corpus*, upon application an order is drawn up to bring in the body. Upon the defendant being brought before the court, a motion may be made by the prosecutor, or, if he does not make it, by the defendant, that the latter be sworn to answer interrogatories to be put to him by the prosecutor, and that he give bail to answer them, and for the master of the Crown Office to examine the matter and report to the court. On the defendant being sworn the prosecutor is ordered to file interrogatories within four days after service of the order, and in default the defendant can obtain an order for his discharge. On an intimation to one of the parties that the master's report is prepared a motion may be made on four days' notice that the master do on a certain day make his report to the court. The defendant must be present in court when the report is made, and if he is in prison an order must be obtained that the governor of the prison bring him into court. If the defendant is reported in contempt, the court, after hearing the parties on the report, may either pronounce sentence at once or commit him until some future day when he is to be brought into court. On proceeding to sentence, affidavits in mitigation or aggravation may be read, and the defendant or his counsel heard, and the prosecutor's counsel may be heard in reply (*m*).

Sentence.

666. An order for committal in the Chancery Division or on the civil side of the King's Bench Division either commits the offender to prison simply, leaving him to apply for his discharge, or commits him for a fixed period (*n*).

(*i*) *Ex parte Van Sandau* (1846), 1 Ph. 605; *Ex parte Fernandez* (1861), 10 C. B. (N. S.) 3; and see *Re M'Alece* (1873), 7 I. R. C. L. 146; *R.* v. *Lambeth County Court Judge and Jonas* (1887), 36 W. R. 475.

(*k*) 32 & 33 Vict. c. 62.

(*l*) Compare the forms of writ of attachment, R. S. C., Appendix H, No. 12, and Crown Office Rules, 1906, Appendix, No. 190. The first follows the old Chancery form, but differs from it in not fixing a date for the return of the writ. See *Owen* v. *Pritchard*, [1876] W. N. 147; R. S. C., Ord. 52, r. 11. The form prescribed by the Crown Office Rules follows the old common law form.

(*m*) Crown Office Rules, 1906, rr. 240 – 242. The examination by interrogatories is often dispensed with.

(*n*) The common law courts leant to fixing the period of imprisonment in cases of committal for criminal contempt. See, *e.g.*, *Crawford's Case* (1849), 13 Q. B. 613; *Ex parte Fernandez* (1861), 10 C. B. (N. S.) at p. 39; and see *Re Maria Annie Davies* (1888), 21 Q. B. D. 236, *per* MATHEW, J., at p. 238. In the Court of Chancery no period was fixed, the offender being left to apply for his discharge when he could satisfy the court that he had been sufficiently punished,

SECT. 4. Order for Attachment or Committal.

In cases of contempt in the face of the court, the contempt being apparent, and the court having full cognisance of the facts, the offender is sentenced forthwith and conveyed to prison by the tipstaff (*o*).

In cases of criminal contempt the court may impose a fine, the amount of which is in the discretion of the court, either as an alternative or in addition to committal or attachment, or may order the respondent to give security to be of good behaviour (*p*).

Conditional order.

667. An order for attachment cannot be made conditional on the happening of a future uncertain event, but it is common practice, when attachment issues to enforce obedience to an order, to direct the writ to lie in the office for a specified time to enable the respondent to comply (*q*).

Various matters.

668. Submission to an order for attachment, though expressed in the order, is not a waiver of the protection afforded by s. 9 of the Bankruptcy Act, 1883 (*r*).

On a motion for attachment for disobedience to an order to execute a deed the court, if satisfied that sufficient notice of intention to ask in the alternative has been given, may make an order that the deed shall be executed by such person as the court may nominate for that purpose (*s*), instead of an order for attachment (*t*).

An application for attachment will not be granted to enforce obedience to an order to perform two acts, default being proved as to one and the direction as to the other having admittedly been included in the order by mistake (*a*).

Costs.

669. The costs of an application for attachment or committal in the Chancery Division or on the civil side of the King's Bench Division are in the discretion of the court, and should be asked for on the hearing of the application (*b*). The respondent can only be ordered to pay costs if he has been guilty of contempt (*c*).

A person attached for contempt in procedure who has cleared his contempt, cannot be detained in prison because he has not paid

in the same manner as in the case of attachment. See *Re Bahama Islands*, [1893] A. C. 138, at p. 145. But now a period is sometimes fixed on committal in the Chancery Division. See, *e.g.*, *Ilkley Local Board* v. *Oswald Lister* (1895), 11 T. L. R. 176; *Seaward* v. *Paterson*, [1897] 1 Ch. 545, C. A.; *Re Septimus Parsonage & Co.*, [1901] 2 Ch. 424.

(*o*) See, *e.g.*, *Bruce's Case* (1828), Sanders, Chancery Orders, 736. See also *Ex parte Fernandez* (1861), 10 C. B. (N. S.) 39; *Watt* v. *Ligertwood* (1874), L. R. 2 Sc. & Div. 361; and Mr. Registrar Lavie's Memorandum, [1893] 1 Ch. 259, n.

(*p*) See note (*c*), p. 280, *ante*.

(*q*) *Re Lumley, Ex parte Cathcart*, [1894] 2 Ch. at p. 272; and see *Shurrock* v. *Lillie* (1888), 4 T. L. R. 355. See *R.* v. *Bottomley* (1908), *Times*, 19th December.

(*r*) 46 & 47 Vict. c. 52; *Re Manning* (1885), 30 Ch. D. 480, C. A.

(*s*) Under s. 14 of the Judicature Act, 1884 (47 & 48 Vict. c. 61).

(*t*) *Howarth* v. *Howarth* (1886), 11 P. D. 95, C. A.

(*a*) *Brucklebusch* v. *Cousins* (1888), 5 T. L. R. 137. But the refusal of the application may be without prejudice to a separate application with regard to the default proved (*ibid.*).

(*b*) *Abud* v. *Riches* (1876), 2 Ch. D. 528.

(*c*) *Re Emmerson, Rawlings* v. *Emmerson* (1887), 57 L. J. (P.) 1, C. A.

SECT. 4. Order for Attachment or Committal.

the costs occasioned by his contempt (*d*); but where a person committed for communicating with a ward was ordered to be discharged on payment of certain costs, and the costs were not paid, the discharge was refused (*e*).

Solicitor and client costs of a motion for attachment or committal may be given to the party moving, by way of indemnity; but solicitor and client costs cannot be given to the respondent if the motion fails (*f*).

On the Crown side of the King's Bench Division, if the respondent is found not to be in contempt, the court may award him costs (*g*).

SECT. 5.—*Execution.*

Attachment.

670. A writ of attachment is executed by the sheriff by lodging the person attached in prison (*h*), where he remains until an order is made for his discharge, or, if the attachment is subject to s. 4 of the Debtors Act, 1869 (*i*), until the expiration of one year, if an order of discharge is not sooner made (*k*). The sheriff is not bound to bring the accused actually before the court, unless specially directed to do so (*l*).

An order for attachment is only in force for one year if no attachment has been issued upon it, but if an attachment has been issued, a second writ to a different sheriff may issue though the order is more than a year old (*m*). A writ of attachment is considered as issued at the first moment of the day on which it issues (*n*).

Committal.

671. An order of committal is executed by the tipstaff of the court under a warrant issued in pursuance of the order (*o*). The prisoner is taken to Brixton or Holloway Prison (*p*), and remains there until an order is made for his discharge, or the sentence, if

(*d*) *Jackson* v. *Mawby* (1875), 1 Ch. D. 86; *Micklethwaite* v. *Fletcher* (1879), 27 W. R. 793; *Ayres* v. *Ayres* (1901), 85 L. T. 648. But see *Steele* v. *Hutchings* (1879), W. N. 18.

(*e*) *Re M.* (1876), 46 L. J. (CH.) 24, C. A. As to costs on discharge, see p. 324, *post*.

(*f*) *Plating Co.* v. *Farquharson* (1881), 17 Ch. D. 49, C. A.

(*g*) Crown Office Rules, 1906, r. 242 (12).

(*h*) As to the form of the writ, see p. 316, *ante*. Under a Home Office regulation of August, 1902, male prisoners imprisoned for contempt by order of the High Court, including prisoners committed by the High Court sitting in Bankruptcy (see Bankruptcy Act, 1883 (46 & 47 Vict. c. 62), s. 120), are lodged in Brixton Prison, and females in Holloway (except persons attached out of London, who are lodged in the county prison).

(*i*) 32 & 33 Vict. c. 62.

(*k*) But see, as to the practice on the Crown side of the King's Bench Division, p. 316, *ante*.

(*l*) *Greaves* v. *Keene* (1879), 4 Ex. D. 73. For returns by sheriff to writs, generally, see title SHERIFFS AND BAILIFFS.

(*m*) Daniell, Chancery Practice, 7th ed., 709. Two or more attachments may be sued out against the same person into different counties (*ibid.* 710).

(*n*) *Stephens* v. *Neale* (1816), 1 Madd. 550.

(*o*) See Mr. Registrar Lavie's Memorandum, [1893] 1 Ch. 259, n. For form of warrant, see *ibid.* 263. As to the office of tipstaff, see *G.* v. *L.*, [1891] 3 Ch. 126, at p. 128, n.

(*p*) See note (*h*), *supra*.

for a fixed period, expires (*q*). In the absence of the tipstaff, the court appoints the usher to act in his place (*r*).

Arrest.

The arrest under attachment or upon committal may be made at any time of the day or night but not on Sunday, except in cases of criminal contempt (*s*).

When the contempt is criminal, or when it consists in wilful disobedience to an order, the officer executing the process may, after due notice, break open an outer door (*t*).

Where a person sought to be attached is already in custody, the sheriff lodges a detainer with the governor of the prison, who delivers over the prisoner at the expiration of his sentence, and he is thereupon imprisoned under the attachment (*a*). It is not necessary to bring him into court to be committed (*b*).

When a sheriff returns *non est inventus* to a writ of attachment, the prosecuting party may apply for an order for the serjeant-at-arms (*c*).

An order for the serjeant-at-arms will be made to enforce an order for delivery up of a ward of court (*d*).

Prison treatment.

672. Persons imprisoned under any rule, order, or attachment for contempt of court are treated as offenders of the first division (*e*). A person committed (*f*) for acting as a solicitor

(*q*) As to committing for a fixed period, see note (*n*), p. 316, *ante*.

(*r*) Seton, Judgments and Orders, 6th ed., 470. For form of bench warrant authorising persons other than the tipstaff to effect an arrest under an order for committal, see R. S. C., Appendix H, Form 12A (Annual Practice, 1909, Vol. II., p. 113). For form of memorandum to be signed by a Chancery registrar authorising the tipstaff to arrest a person present in court who is committed, see Mr. Registrar Lavie's Memorandum, [1893] 1 Ch. at p. 263.

(*s*) *Ex parte Whitchurch* (1749), 1 Atk. 55; *Burdett* v. *Abbot* (1811), 14 East, at p. 162; but see Edwards on Execution, 245, where a doubt is expressed as to the legality of an arrest on Sunday in any case under process of contempt. It is clear that a commission of rebellion under the old Chancery practice might be executed on Sunday (*Miller* v. *Knox* (1838), 4 Bing. (N. C.) at p. 581).

(*t*) *Brigg's Case* (1616), 1 Roll. Rep. 336; *Harvey* v. *Harvey* (1884), 26 Ch. D. 644. The same principle would seem to apply in all other cases of contempt accompanied by misconduct. See p. 297, *ante*.

(*a*) Braithwaite's Practice, 281.

(*b*) *Oldfield* v. *Cobbett* (1849), 12 Beav. 91.

(*c*) See Seton, Judgments and Orders, 6th ed., 447, 448, and General Order, January, 1870 (5 Ch. App. xxxiii.), r. 6. But as the order was formerly only a step towards sequestration, and sequestration, where applicable, is now an alternative to attachment, the practice may be considered obsolete. The serjeant-at-arms is an officer of the court, and its order directs him to apprehend the offender and bring him to the bar of the court. As to the office of serjeant-at-arms, see *G.* v. *L.*, [1891] 3 Ch. 126, at p. 128, n.

(*d*) *G.* v. *L.*, *supra*. For form of order, see Seton, Judgments and Orders, 6th ed., 1048.

(*e*) Prison Act, 1877 (40 & 41 Vict. c. 21), s. 41; Prison Act, 1898 (61 & 62 Vict. c. 41), s. 6; Prison Rules, April, 1899 (Stat. R. & O. Rev., Prison, England, 42), rr. 213—231. These rules apply to all persons attached or committed by summary process and expressed in the order or warrant to be imprisoned for contempt of court, whether the contempt be of a criminal nature or not. A person convicted of contempt upon indictment or information would be in a less favourable position, because, subject to any direction of the court, he would be treated as an offender of the third division under s. 6 of the Prison Act, 1898.

(*f*) Under s. 32 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73).

SECT. 5. **Execution.**

though not duly qualified, is an ordinary criminal prisoner, and is not entitled to be treated as an offender of the first division (*g*).

Staying execution.

673. Where leave to issue attachment for disobedience to an order is granted, and before it is executed the order is obeyed, the prosecuting party should immediately take steps to stay the execution (*h*).

Discharge by mistake.

674. A second writ of attachment will not issue for the arrest of a person attached for contempt in procedure (*i*) and discharged from custody by mistake (*k*).

SECT. 6.—*Privilege from Arrest.*

Privilege.

675. Privilege from arrest cannot be successfully claimed by a person guilty of criminal contempt (*l*), nor apparently in cases of contempt in procedure accompanied by circumstances of misconduct (*m*).

With regard to cases where no misconduct is imputed, the question of privilege was of importance before arrest on mesne process and imprisonment for debt were abolished (*n*), and when, according to the practice of the Court of Chancery, a suitor could without any order cause his opponent to be attached for default in

(*g*) *Osborne* v. *Milman* (1887), 18 Q. B. D. 471, C. A.; Prison Act, 1877 (40 & 41 Vict. c. 21), s. 41; Prison Act, 1898 (61 & 62 Vict. c. 41), s. 6 (5).

(*h*) *Gay* v. *Hancock* (1887), 56 L. T. 726.

(*i*) For definition of "contempt in procedure," see p. 280, *ante*.

(*k*) *Church's Trustee* v. *Hibbard*, [1902] 2 Ch. 784, C. A. The same principle would no doubt apply in the case of criminal contempt. Whether the contemnor can be retaken under the original writ, *quære* (*ibid.*). A man could not formerly be taken in execution twice on the same judgment, even by consent (*Blackburn* v. *Stupart* (1802), 2 East, 243); but a second writ of attachment may issue while the first remains unexecuted, care being taken that no further proceedings are taken under the first writ (*Andrews* v. *Walton* (1845), 1 Ph. 619); and see *Merchant* v. *Frankis* (1842), 3 Q. B. 1.

(*l*) *Long Wellesley's Case* (1831), 2 Russ. & M. 639; *Lechmere Charlton's Case* (1836), 2 My. & Cr. 316; *Onslow's and Whalley's Case* (1873), L. R. 9 Q. B. 219, at pp. 228, 229; *Re Freston* (1883), 11 Q. B. D. 545, C. A.

(*m*) For definition of "contempt in procedure," see p. 280, *ante;* and see p. 297, *ante*. *Re Freston*, *supra*, and *Re Gent*, *Gent-Davis v. Harris* (1888), 40 Ch. D. 190, are authorities for the statement in the text. Upon an application in bankruptcy to commit a witness for refusing to be sworn it was held that the committal, if ordered, would not be punitive, and that the witness was therefore entitled to claim privilege (*Re Armstrong*, *Ex parte Lindsay*, [1892] 1 Q. B. 327). Bankruptcy Rule 70, which was said to apply in that case, provides that any person wilfully disobeying any subpœna etc. shall be guilty of contempt and may be dealt with accordingly, and it is difficult to see how the object of the rule can be said to be not punitive and to reconcile this decision with what was said by the Court of Appeal in *Re Freston*, *supra*, commented on by Chitty, J., in *Harvey* v. *Harvey* (1884), 26 Ch. D. 644, at p. 651. In *Aylesford* (*Earl*) v. *Poulett* (*Earl*), [1892] 2 Ch. 60, NORTH, J., thought the question whether a peer could claim privilege when it was sought to attach him for default in payment of money due from him as a trustee "a very nice point indeed," but did not decide it. In *Re Gent*, *Gent-Davis* v. *Harris*, *supra*, the same judge had held that privilege could not be allowed to a member of Parliament who was in default in payment of money due from him in a fiduciary capacity, and the same principle seems to be involved in *Aylesford* (*Earl*) v. *Poulett* (*Earl*), *supra*.

(*n*) See the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 1, and the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4.

SECT. 6. Privilege from Arrest.

putting in an answer or for disobedience to an order directing him to do an act; but as attachment never issues without leave under the present practice, and the court will not inflict imprisonment where no element of crime or misconduct exists (*o*), the question of privilege upon an application for attachment or committal for contempt can seldom arise.

When privilege can be claimed.

Where privilege has been allowed in recent times it has been on the ground that the process to be enforced was merely civil process, and not of a penal nature (*p*). On the same ground it might be contended that it is not the practice of the court to imprison in such a case. The question whether a criminal element exists in the contempt is generally involved in the question whether privilege can be claimed. If a criminal element does exist, there can be no privilege. In the absence of a criminal element, the decision that there shall be no imprisonment may be based either on privilege or on the practice of the court not to imprison in such a case (*q*).

While attending Court.

The old Chancery rule (*r*) that officers and attendants upon the court, suitors, and witnesses were to have privilege *eundo, redeundo, et morando* for their necessary attendance was annulled by the Rules of the Supreme Court, 1883 (*s*), but a similar rule, resting on "traditions of Westminster Hall," existed at common law (*a*) and has been acted upon in recent times (*b*).

Member of Parliament.

If a person having privilege of Parliament commits an act of bankruptcy, he may be dealt with under the Bankruptcy Act in like manner as if he had no such privilege (*c*). It would seem that this provision prevents such a debtor from setting up

(*o*) The statement in the text does not apply in the case of certain proceedings by the Crown (see note (*l*), p. 307, *ante*).

(*p*) See *Re Armstrong, Ex parte Lindsay*, [1892] 1 Q. B. 327, note (*m*), p. 320, *ante*. See also *Young* v. *Young* (1896), 12 T. L. R. 503, where a respondent husband in a divorce suit was attached for failing to give security for the petitioner's costs and claimed to be released on the ground of privilege. In granting his release the court considered that the claim of privilege had been established, but preferred to base its decision on the fact that, the husband having been made bankrupt, it was impossible for him to comply with the order to give security.

(*q*) See *Young* v. *Young, supra*. In *Hobern* v. *Fowler* (1892), 62 L. J. (Q. B.) 49, it was held by COLLINS, J., that the process of commitment under the Distress for Rates Act, 1849 (12 & 13 Vict. c. 14), s. 2, was civil process, and that a person arrested thereunder was entitled to claim privilege; but in that case the statute has provided imprisonment as a direct means of enforcing payment, and there is no question of contempt. See also *Seaman* v. *Burley*, [1896] 2 Q. B. 344, C. A., and *Re Edgcome, Ex parte Edgcome*, [1902] 2 K. B. 403, C. A., by which it appears that commitment under the Distress for Rates Act, 1849, is punitive, and *Hobern* v. *Fowler, supra*, it is submitted, is in effect overruled. See also *Robson* v. *Biggar* (1907), 24 T. L. R. 125, C. A.

(*r*) Consolidated Chancery Orders, 1860, Ord. 42, r. 1, founded on Lord Bacon's Ordinances of 1618, No. 86 (Beames, Chancery Orders, 38).

(*s*) Preliminary Order and Appendix O. No corresponding rule has taken its place, and apparently Ord. 72, r. 2, is not sufficient to keep it on foot. See *Magnus* v. *National Bank of Scotland* (1888), 36 W. R. 602.

(*a*) *Meekins* v. *Smith* (1791), 1 Hy. Bl. 636; *Newton* v. *Constable* (1841), 9 Dowl. 933. See also *Gilpin* v. *Cohen* (1869), L. R. 4 Exch. 131.

(*b*) *Hobern* v. *Fowler, supra*, note (*q*); and see *Re Johnson* (1887), 20 Q. B. D. 68, C. A., *per* BOWEN, L.J., at p. 74.

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 124.

SECT. 6. Privilege from Arrest.

privilege upon an application for his committal founded upon an alleged contempt of court (*d*).

SECT. 7.—*Appeal from Order.*

Appeal.

676. The Court of Appeal has jurisdiction and power to hear and determine an appeal from an order of the High Court or a judge thereof, for leave to issue attachment or for committal, but subject to the provision that no appeal lies from any judgment of the High Court in any criminal cause or matter (*e*). The question whether an appeal lies depends upon whether the order for attachment or committal is made in the exercise of a criminal jurisdiction, or, in other words, whether the contempt is criminal (*f*). But though, the contempt being criminal, an appeal on the merits would really be an appeal from a summary conviction for a criminal offence, and therefore does not lie (*g*), upon the question whether there was jurisdiction to make the order an appeal always lies (*h*).

Where the order for attachment or committal is mere civil process to enforce obedience to an order, and the contempt is therefore only theoretical, an appeal lies (*i*), and where the order

(*d*) See, *e.g.*, s. 24 (4) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).

(*e*) See Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 19, 47. The word "judgment" in s. 47 is treated in the cases as equivalent to "decision." No right of appeal from an order for attachment or committal for criminal contempt is given by the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), which extends only to convictions upon indictment or information. See ss. 3, 20. See also title CRIMINAL LAW AND PROCEDURE.

(*f*) See *Ex parte Woodhall* (1888), 20 Q. B. D. 832, C. A.; *R.* v. *Barnardo* (1889), 23 Q. B. D. 305, C. A.; *O'Shea* v. *O'Shea and Parnell* (1890), 15 P. D. 59, C. A.; *Re Evans, Evans* v. *Noton*, [1893] 1 Ch. 252, C. A.; *A.-G.* v. *Kissane* (1893), 32 L. R. Ir. 220, C. A.; *Re Bahama Islands*, [1893] A. C. at p. 145 (Law Officers and Sutton *arg.*). In *R.* v. *Jordan* (1888), 36 W. R. 797, C. A., the right to appeal was doubted, but not decided. Afterwards LINDLEY, L.J., expressed the view that no appeal lay in that case. See *O'Shea* v. *O'Shea and Parnell*, *supra*, at p. 64. In *Helmore* v. *Smith* (1886), 35 Ch. D. 449, C. A. (interference with a receiver), and *Re Johnson* (1888), 20 Q. B. D. 68, C. A. (gross abuse of one solicitor by another in the precincts of the court), it would seem that the appeals could not have been entertained had objection been taken. In *Seaward* v. *Paterson*, [1897] 1 Ch. 545, C. A., an appeal was heard on the merits, as well as on the ground of want of jurisdiction, from an order committing the defendant for breach of an injunction and strangers for aiding and abetting therein. Had the point been taken, it is submitted that the merits could not have been discussed so far as the strangers were concerned, the contempt being criminal. See p. 292, *ante*.

(*g*) See the judgment of LINDLEY, L.J., in *O'Shea* v. *O'Shea and Parnell*, *supra*, at p. 64. As to the principles upon which the Judicial Committee has acted in entertaining appeals from Indian and colonial courts in cases of contempt, see *Rainy* v. *Sierra Leone Justices* (1852), 8 Moo. P. C. C. 47; *Re McDermott* (1866), L. R. 1 P. C. 260. See also *Surendranath Banerjea* v. *Justices of Bengal* (1883), L. R. 10 Ind. App. 171; *Re Abraham Mallory Dillett* (1887), 12 App. Cas. 459.

(*h*) *R.* v. *Jordan*, *supra*; *O'Shea* v. *O'Shea and Parnell*, *supra*; *Seaward* v. *Paterson*, *supra*; *Re Grayston*, *Re Wall* (1888), 4 T. L. R. 772, C. A.; *A.-G.* v. *Kissane*, *supra*; *Lewis* v. *Owen*, [1894] 1 Q. B. 102.

(*i*) *O'Shea* v. *O'Shea and Parnell*, *supra*; and see the following cases where appeals were entertained: *Witt* v. *Corcoran* (1876), 2 Ch. D. 69, C. A.; *Stevens* v. *Metropolitan District Rail. Co.* (1885), 29 Ch. D. 60, C. A.; *Bristow* v. *Smyth*

SECT. 7. Appeal from Order.

is civil process, but the contempt involves misconduct calling for the exercise of a punitive or disciplinary jurisdiction, it seems to be established that an appeal lies (*k*).

An appeal lies from a refusal to attach or commit, but the Court of Appeal will not interfere when the judge of first instance has exercised his discretion, unless he has done so on a manifestly erroneous principle (*l*).

No appeal lies without leave of the judge or of the Court of Appeal from any interlocutory order, except, *inter alia*, where the liberty of the subject is concerned (*m*). Leave is required to appeal from the refusal of a motion to commit for breach of an undertaking, on the ground that the liberty of the subject is not concerned (*n*).

An order for committal for contempt is subject to appeal when made under the Bankruptcy Act, 1883 (*o*).

SECT. 8.—*Discharge from Custody.*

Discharge.

677. An application to discharge from custody a person imprisoned by attachment or by an order for committal, where no period of imprisonment is fixed, is made by motion or summons, and may be founded on evidence that the prisoner has purged his contempt, or that there is an irregularity in the proceedings justifying the discharge of the order (*p*). Notice of the application must be

(1885), 2 T. L. R. 36, C. A.; *Hunt* v. *Clarke* (1889), 58 L. J. (Q. B.) 490, C. A.; *R.* v. *Barnardo* (1889), 23 Q. B. D. 305, C. A.; *Southwark and Vauxhall Water Co.* v. *Hampton Urban Council*, [1899] 1 Q. B. 273, C. A.

(*k*) The point is not free from doubt (see *Re Evans*, *Evans* v. *Noton*, [1893] 1 Ch. 252, *per* LINDLEY, L.J., at p. 266), but the general tendency of the cases is towards allowing the right of appeal where the process is merely punitive or disciplinary, or the contempt is wilful, as distinguished from cases of purely criminal contempt. See *Re Dudley* (1883), 12 Q. B. D. 44, C. A.; *Crowther* v. *Elgood* (1887), 34 Ch. D. 691, C. A.; *Re Wray* (*a Solicitor*) (1887), 36 Ch. D. 138, C. A.; *Preston* v. *Etherington* (1887), 36 W. R. 49, C. A.; *Re Ashwin*, *Ex parte Ashwin* (1890), 25 Q. B. D. 271, C. A.; *Re Eede* (1890), 25 Q. B. D. 228, C. A.; *Re Evans*, *Evans* v. *Noton*, *supra*; *Re Smith*, *Hands* v. *Andrews*, [1893] 2 Ch. 1, C. A.; *Re Berwick* (*Lord*), *Berwick* (*Lord*) v. *Lane* (1900), 81 L. T. 797, C. A.; *Bowden* v. *Yoxall*, [1901] 1 Ch. 1, C. A.; *Re Edgcome*, *Ex parte Edgcome*, [1902] 2 K. B. 403, C. A. Some of these cases, it will be seen, were decided before *R.* v. *Jordan* (1888), 36 W. R. 797, C. A., where the doubt as to a right of appeal in cases of criminal contempt was first raised.

(*l*) See *Jarmain* v. *Chatterton* (1882), 20 Ch. D. 493, C. A., explaining *Ashworth* v. *Outram* (*No.* 2) (1877), 5 Ch. D. 943, C. A.; *Bristow* v. *Smyth* (1885), 2 T. L. R. 36, C. A. In cases of criminal contempt this question must now be considered in connection with *O'Shea* v. *O'Shea and Parnell* (1890), 15 P. D. 59, C. A. See also *Crowther* v. *Elgood* (1887), 34 Ch. D. 691, C. A.

(*m*) Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 1.

(*n*) *Bowden* v. *Yoxall*, [1901] 1 Ch. 1, C. A. In *Lancashire* v. *Hunt*, [1895] W. N. 52, NORTH, J., held that leave was not required to appeal from an order dismissing a motion to commit for breach of an injunction because the liberty of the subject was concerned, but this case seems to have been in effect overruled by *Bowden* v. *Yoxall*, *supra*.

(*o*) 46 & 47 Vict. c. 52, s. 104; *Re Ashwin*, *Ex parte Ashwin* (1890), 25 Q. B. D. 271, C. A.

(*p*) For forms, see Daniell, Chancery Forms, 5th ed., pp. 442, 443; Seton, Judgments and Orders, 6th ed., pp. 471, 475, 476. The fact that a prisoner has submitted to an order for attachment does not preclude him from claiming the protection of s. 9 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (*In re Manning* (1885), 30 Ch. D. 480, C. A.).

SECT. 8. Discharge from Custody.

served on the opposite party (*q*). A motion to discharge a prisoner in contempt takes precedence of all other motions in the Chancery Division (*r*). In a matrimonial suit the application may be made to a registrar if the court is not sitting (*s*).

Jurisdiction.

678. The court has power to order a discharge from custody in every case of contempt (*t*), except in case of committal for a fixed period for criminal contempt, when an application for discharge before the expiration of the period must be made to the Crown through the Home Secretary (*a*).

Where an order for attachment or committal is made to vindicate the authority of the court, and the court considers that the offender has been sufficiently punished, it will discharge him without regard to the opposition of the prosecuting party (*b*).

A party in contempt for disobedience to an order, who is extradited to this country for an alleged criminal offence, will not be discharged from custody on the ground that, having been acquitted of the criminal offence, he is detained under an attachment previously issued, the attachment in this case being a civil process (*c*).

Discharge under Debtors Act, 1869.

679. A writ of attachment shows by an indorsement whether or not the imprisonment thereunder is subject to s. 4 of the Debtors Act, 1869 (*d*). At the end of a year, if that section applies and if the prisoner is not sooner discharged by order of the court, the sheriff is bound to discharge him without any order (*e*).

Costs.

680. The order of discharge usually directs the prisoner to pay the costs occasioned by the contempt, but, except in cases of criminal contempt, the discharge will not be made conditional upon the payment of costs (*f*).

(*q*) *Re Evans, Evans* v. *Noton* (1893), 68 L. T. 324.

(*r*) *Ashton* v. *Shurrock* (1880), 43 L. T. 530; *Bowden* v. *Yoxall*, [1901] 1 Ch. 1, C. A., at p. 2. But the application is often made by summons. The motion was always made by counsel in the Queen's Bench, and the court refused a *habeas corpus* to bring up a prisoner to enable him to move in person (*Ford* v. *Nassau* (1842), 1 Dowl. (N. S.) 631); and see *Benns* v. *Mosley* (1857), 2 C. B. (N. S.) 116.

(*s*) Matrimonial Causes Rules, 112. See also title HUSBAND AND WIFE.

(*t*) Contempt of Court Acts, 1830 and 1832 (11 Geo. 4 & 1 Will. 4, c. 36; 2 & 3 Will. 4, c. 58); Debtors Act, 1878 (41 & 42 Vict. c. 54).

(*a*) *Sutherland* v. *Sutherland* (1893), *Times*, 6th May, p. 18, col. 4.

(*b*) *Adlard* v. *Smith* (1819), 6 Price, 321. See also *North* v. *Huber* (1861), 29 Beav. 437; *Felkin* v. *Herbert* (1864), 33 L. J. (CH.) 294; *Re Maria Annie Davies* (1888), 21 Q. B. D. 236. In the last-mentioned case the court *ex mero motu* ordered the discharge of the contemnor, who had been committed for breach of an injunction, and had remained in prison for eighteen months, the contemnor not to be permitted to issue any writ or summons without leave of the judge. See now the Vexatious Actions Act, 1896 (59 & 60 Vict. c. 51).

(*c*) *Pooley* v. *Whetham* (1880), 15 Ch. D. 435, C. A.; Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 19; though, had it been proved that the warrant of extradition was obtained for the purpose of effecting an arrest under the attachment, the court would have granted relief against such an abuse (S. C.). See title EXTRADITION AND FUGITIVE OFFENDERS.

(*d*) 32 & 33 Vict. c. 62. See form of writ, R. S. C., Appendix H, No. 12.

(*e*) *Re Edwards, Brooke* v. *Edwards* (1882), 21 Ch. D. 230.

(*f*) *Jackson* v. *Mawby* (1875), 1 Ch. D. 86; *Re Jarvis*, [1886] W. N. 118; and see *Ayres* v. *Ayres* (1901), 85 L. T. 648. See also, as to the costs of contempt, pp. 317 and 318, *ante*.

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In cases of criminal contempt the order of discharge may be conditional on the payment of costs (*g*), such costs being equivalent to a fine for the contempt as well as an indemnity to the opposite party, and the Debtors Acts having no application.

Where a contemnor is without means the court will, upon the contempt being purged, order his discharge without directing him to pay costs (*h*).

Visitation of prisoners.

681. It is the duty of the official solicitor to visit Brixton and Holloway Prisons (*i*) four times a year, and to examine prisoners confined for contempt and report to the Lord Chancellor, who may assign them a solicitor for taking any necessary steps on their behalf. It is the duty of the gaoler of every other prison to whom any person is committed for contempt to report the case to the Lord Chancellor, who may direct the official solicitor to take such steps on behalf of the prisoner as may be required (*k*).

(*g*) *Re M.* (1876), 46 L. J. (CH.) 24, C. A.

(*h*) *West Ham Corporation* v. *Cunningham* (1906), *Times*, 12th October, p. 13, col. 2.

(*i*) See note (*h*), p. 318, *ante*.

(*k*) Court of Chancery Act, 1860 (23 & 24 Vict. c. 149), ss. 2, 3, 5; and see *Moutrie* v. *Mitchell*, [1901] 1 K. B. 596, C. A.

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† For the capacity or otherwise of certain persons and bodies to enter into contracts, see the particular title—*e.g.*, COMPANIES; CORPORATIONS; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; INFANTS AND CHILDREN; LUNATICS AND PERSONS OF UNSOUND MIND; PARTNERSHIP.

‡ The subjects of Fraud, Misrepresentation, and Mistake, as affecting the consent of a party to a contract, are separately treated under titles MISREPRESENTATION AND FRAUD; MISTAKE.

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Part I.—Definitions and Classification.

SECT. 1.—*Definitions.*

SECT. 1. Definitions.

682. A contract is an agreement made between two or more persons which is intended to be enforceable at law, and is constituted by the acceptance by one party of an offer made to him by the other party to do or to abstain from doing some act (*a*). The offer and acceptance may either be express or inferred by implication from the conduct of the parties (*b*). Contract.

An offer when accepted is called a promise, and the term contract denotes the legal obligation which is thereby created, on the one part to perform the promise and on the other to accept performance of it. Where the contract consists of mutual promises there is an obligation on each party to perform his own promise and to accept performance of the other's promise. Promise.

The party by whom an accepted offer is made is called the promisor, and the party by whom it is accepted is called the promisee. Promisor and promisee.

A void contract is one which has no legal effect. A voidable Void and voidable.

(*a*) *Payne* v. *Cave* (1789), 3 Term Rep. 148; Indian Contract Act, 1872 (Act No. IX. of 1872), s. 2. If the terms of an agreement are so vague or indefinite that it cannot be ascertained with reasonable certainty what is the intention of the parties, there is no contract enforceable at law. See *Taylor* v. *Brewer* (1813), 1 M. & S. 290; *Guthing* v. *Lynn* (1831), 2 B. & Ad. 232; *Bryant* v. *Flight* (1839), 5 M. & W. 114; *Roberts* v. *Smith* (1859), 4 H. & N. 315; *Coles* v. *Hulme* (1828), 8 B. & C. 568, 573; *Cooper* v. *Hood* (1858), 28 L. J. (CH.) 212; *Re Vince, Ex parte Baxter*, [1892] 2 Q. B. 478, C. A.; *Richardson* v. *Garnett* (1895), 12 T. L. R. 127, C. A.; *Montreal Gas Co.* v. *Vasey* (1900), 69 L. J. (P. C.) 134; *Douglas* v. *Baynes*, [1908] A. C. 477; and see p. 345, *post*. There are certain kinds of agreements which from their nature are not enforceable at law. For instance, the services rendered by a barrister when acting in his professional capacity are of a purely honorary character, and the payment of his fees is a matter of honour, not of legal obligation, and cannot be made the subject of a contract; nor, on the other hand, does he incur any legal liability for the non-performance or the negligent performance of any such services undertaken by him (*Kennedy* v. *Broun* (1863), 13 C. B. (N. S.) 677; *Swinfen* v. *Chelmsford* (*Lord*) (1860), 5 H. & N. 890; *R.* v. *Doutre* (1884), 9 App. Cas. 745, P. C.; *Re Le Brasseur and Oakley*, [1896] 2 Ch. 487, C. A.; and compare *Ex parte Colquhoun* (1890), 38 W. R. 688). See title BARRISTERS, Vol. II., p. 392.

(*b*) See p. 348, *post*.

SECT. 1. Definitions.

contract is one which may be either affirmed or repudiated at the option of one of the parties, but not of the other. A contract which is perfectly valid may yet be unenforceable owing to some rule of law which renders it incapable of proof (*c*).

SECT. 2.—*Classification of Contracts.*

Classes of contracts.

683. Contracts are divided, according to the mode of their formation, into three classes—(1) contracts of record; (2) contracts under seal; (3) simple contracts (*d*).

SUB-SECT. 1.—*Contracts of Record.*

Contracts of record.

684. The term contract of record is applied to judgments and recognizances which are enrolled in the record of the proceedings of a court of record and in law imply a debt. The obligation in this case arises from the entry on the record, and does not depend upon any express agreement between the parties. Contracts of record, therefore, are not contracts in the sense in which that term is here employed (*e*).

SUB-SECT. 2.—*Contracts under Seal.*

Contracts under seal.

685. A contract under seal, or, as it is sometimes called, a contract by specialty, is a contract which is made by deed (*f*). As a general rule a contract may be made in whatever form the parties think fit, but in certain cases it can only be made in the form of a deed (*g*). A promise made under seal is called a covenant.

The fundamental difference between contracts under seal and simple contracts is that the former derive their validity from their form alone and are binding even without consideration (*h*), except in the case of contracts in restraint of trade, which will not be enforced unless supported by consideration (*i*); whereas simple contracts, whether verbal or in writing, are invalid unless there is a valuable consideration for the promise (*j*).

(*c*) For instance, a contract made verbally in a case where the Statute of Frauds requires a memorandum in writing; see p. 361, *post*.

(*d*) 2 Bl. Com. (1786 ed.) 464, 465. Contracts are also classed in relation to their performance as executed and executory. An executed contract is one which has been wholly performed by one of the parties but remains to be performed by the other party; a contract is said to be executory so long as something remains to be done under it by both parties.

(*e*) As to recognizances, see title CRIMINAL LAW AND PROCEDURE; and as to judgments generally, see title JUDGMENTS AND ORDERS.

(*f*) As to deeds generally, see title DEEDS AND OTHER INSTRUMENTS; and as to bonds, see title BONDS, Vol. III., p. 79.

(*g*) See p. 360, *post*.

(*h*) The court will not, however, enforce a voluntary covenant by the equitable remedy of specific performance or injunction (*Ellison* v. *Ellison* (1802), 6 Ves. 656). See titles INJUNCTION; SPECIFIC PERFORMANCE; TRUSTS AND TRUSTEES. As to consideration, see p. 383, *post*.

(*i*) *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535; *E. Underwood & Son, Ltd.* v. *Barker*, [1899] 1 Ch. 300, C. A.; *Haynes* v. *Doman*, [1899] 2 Ch. 13, C. A.; and see title TRADE AND TRADE UNIONS.

(*j*) *Rann* v. *Hughes* (1778), 7 Term Rep. 350, n., H. L. If the consideration for a promise is illegal, the contract is void whether it is made under seal or not; see p. 407, *post*.

686. A promise under seal does not require the express assent of the promisee in order to entitle him to the benefit of it (*k*); and a covenantee may sue on covenants expressed to be made with him although he has not executed the deed (*l*), and even though the deed may contain cross-covenants on his part which form the consideration for the covenants with him (*m*).

Incidents of contract under seal.

A contract under seal has the following incidents:—

Merger.

(1) Where a debtor enters into a covenant to secure a debt which is already owing by him under a simple contract, the remedy on the simple contract is merged in the superior remedy on the covenant and is extinguished in law (*n*).

Estoppel.

(2) Recitals and statements contained in a deed operate by way of estoppel against the parties who made them, in any action or proceeding based on the deed itself (*o*), but not in any collateral action or proceeding (*p*). Whether a recital in a deed is intended as an admission by both parties or only by one of them is a question of construction (*q*). If intended as an admission by both, it estops them both; otherwise it only estops the party whose statement it is intended to be (*q*).

Only party can sue.

(3) No person who is not a party to a deed can sue or be sued upon it, even though it is expressed to be made on his behalf or the covenants in the deed are expressed to be made with him (*r*).

(*k*) *Siggers* v. *Evans* (1855), 5 E. & B. 367.

(*l*) *Morgan* v. *Pike* (1854), 14 C. B. 473; *Rose* v. *Poulton* (1831), 2 B. & Ad. 822; *Petrie* v. *Bury* (1824), 3 B. & C. 353.

(*m*) *Morgan* v. *Pike*, *supra*.

(*n*) *Price* v. *Moulton* (1851), 10 C. B. 561. But this rule does not apply where a contrary intention appears (*Commissioner of Stamps* v. *Hope*, [1891] A. C. 476, P. C.); see p. 457, *post*.

(*o*) *Kingston's* (*Duchess*) *Case* (1776), 20 State Tr. 355; 2 Smith, L. C., 11th ed., 731; *Bowman* v. *Taylor* (1834), 2 Ad. & El. 278; *Carter* v. *Carter* (1857), 3 K. & J. 617. But this doctrine is not to be extended (*General Finance, Mortgage and Discount Co.* v. *Liberator Permanent Benefit Building Society* (1878), 10 Ch. D. 15, *per* JESSEL, M.R., at p. 24). As to estoppel generally, see title ESTOPPEL. A person who is sued on a contract under seal is not precluded from setting up by way of defence that the contract was made for an unlawful purpose or that the consideration was unlawful (*Collins* v. *Blantern* (1767), 2 Wils. 341; 1 Smith, L. C., 11th ed., 369); see p. 407, *post*.

(*p*) *Carter* v. *Carter*, *supra*; *Fraser* v. *Pendlebury* (1861), 31 L. J. (C. P.) 1.

(*q*) *Stroughill* v. *Buck* (1850), 14 Q. B. 781.

(*r*) *Storer* v. *Gordon* (1814), 3 M. & S. 308; *Berkeley* v. *Hardy* (1826), 5 B. & C. 355; *Southampton* (*Lord*) v. *Brown* (1827), 6 B. & C. 718; *Chesterfield and Midland Silkstone Colliery Co.* v. *Hawkins* (1865), 3 H. & C. 677; *Re International Contract Co., Pickering's Claim* (1871), 6 Ch. App. 525; *Schack* v. *Anthony* (1813), 1 M. & S. 573; *Torrington* v. *Lowe* (1868), L. R. 4 C. P. 26; *Re Piercy, Ex parte Piercy* (1873), 9 Ch. App. 33; and see *Reeves* v. *Watts* (1866), L. R. 1 Q. B. 412. But the benefit of a condition or covenant respecting any tenements or hereditaments in a deed relating to real property may be taken by a person who is not a party to the deed (Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 5; *Forster* v. *Elvet Colliery Co., Ltd.*, [1908] 1 K. B. 629, C. A., affirmed by H. L., *sub nom. Dyson* v. *Foster* (1908), 78 L. J. (CH.) 246. See also titles LANDLORD AND TENANT; SALE OF LAND). And see s. 46 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), and title AGENCY, Vol. I., at pp. 168, 208, as to deeds executed by attorney. As to the rights and liabilities in general of strangers to a contract, see p. 342, *post*; as to the assignment of rights under a contract, see p. 495, *post*; and as to the effect of the creation of a trust, see title TRUSTS AND TRUSTEES.

SECT. 2. Classification of Contracts.

(4) The period during which a right of action on a contract under seal may be enforced is twenty years; in the case of a simple contract the period of limitation is six years (*s*).

Limitations.

(5) At common law a contract under seal could not be varied or discharged by a parol contract (*t*). In equity, however, this rule was not recognised (*a*); the rule of equity now prevails (*b*).

Variation by parol.

SUB-SECT. 3.—*Simple Contracts.*

Simple contracts.

687. This class includes all contracts which are not contracts of record or contracts under seal. Simple contracts may be either expressed by word of mouth or in writing, or partly in one way and partly in the other (*c*); or they may be either wholly or partly implied.

Implied contracts.

A contract or part of a contract is implied by the parties where they show by their conduct that it is contemplated and intended by them though not expressed in terms. But where there is a contract in express terms, no agreement which is inconsistent with those terms can be implied from the conduct of the parties. *Expressum facit tacitum cessare* (*d*).

A contract is in some cases said to be implied by law. Such an implied contract is really an obligation imposed by law independently of any actual agreement between the parties, and may be imposed notwithstanding an expressed intention by one of the parties to the contrary (*e*). It is not a contract, in the true sense of the term, at all, but an obligation of the class known in the civil law as *quasi*-contracts.

(*s*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3. This rule is subject to certain qualifications; see title LIMITATION OF ACTIONS.

(*t*) *Kaye* v. *Waghorn* (1809), 1 Taunt. 428; Selwyn, Law of Nisi Prius, 13th ed., p. 468; compare *Kellett* v. *Stockport Corporation* (1906), 70 J. P. 154. But a parol agreement not to enforce performance of the covenants in a deed was valid at common law (*Nash* v. *Armstrong* (1861), 10 C. B. (N. S.) 259).

(*a*) *Webb* v. *Hewitt* (1857), 3 K. & J. 438; *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537.

(*b*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11); see p. 421, *post*.

Creditors claiming in respect of specialty debts were formerly entitled to payment in priority to simple contract creditors in the administration of the estate of a deceased person, but this distinction was abolished by the Administration of Estates Act, 1869 (32 & 33 Vict. c. 46). See title EXECUTORS AND ADMINISTRATORS.

(*c*) In certain cases contracts are required by law to be made in writing; but these are none the less simple contracts, for they derive no efficacy from their form and are not valid unless there is consideration (*Rann* v. *Hughes* (1778), 7 Term Rep. 350, n., H. L.). The effect of the requirement is simply to render the contract incapable of proof unless it is in writing; see p. 362, *post*.

(*d*) *Warde* v. *Stuart* (1856), 1 C. B. (N. S.) 88; *Fullwood* v. *Akerman* (1862), 11 C. B. (N. S.) 737; *Parker* v. *Ibbetson* (1858), 4 C. B. (N. S.) 346; *Biggs* v. *Gordon* (1860), 8 C. B. (N. S.) 638; *Caine* v. *Horsfall* (1847), 1 Exch. 519; *Allan* v. *Sundius* (1862), 1 H. & C. 123; *Phillipps* v. *Briard* (1856), 25 L. J. (EX.) 233; *Bower* v. *Jones* (1831), 8 Bing. 65; *Green* v. *Mules* (1861), 30 L. J. (C. P.) 343; *Moon* v. *Camberwell Borough Council* (1904), 68 J. P. 157, C.A.; *Read* v. *Rann* (1830), 10 B. & C. 438; *Abbott* v. *Bates* (1875), 45 L. J. (Q. B.) 117, C. A. As to the interpretation of contracts generally, see p. 509, *post*.

(*e*) *Gore* v. *Gibson* (1845), 13 M. & W. 623, *per* POLLOCK, C.B., at p. 626; *Re Rhodes*, *Rhodes* v. *Rhodes* (1890), 44 Ch. D. 94, C. A., *per* LINDLEY, L.J., at p. 107. As to contracts implied by law, see p. 463, *post*.

Part II.—Parties to Contract.

SECT. 1.—*Number of Parties.*

SECT. 1. Number of Parties.

688. There must be at least two parties to a contract, a promisor and a promisee. An arrangement made between two departments or branches of the same firm or company, or between a partner and the firm, is not a contract, because a person cannot contract with himself (*f*).

Must be two parties at least.

The parties to a contract must be definite persons, ascertained and existing at the time when the contract is made (*g*). An offer may be made to the world at large, but it can only be accepted by a definite person or definite persons, though the promisee need not be known to the promisor at the time when the contract is made (*h*).

Definite persons.

(*f*) *Grey* v. *Ellison* (1856), 1 Giff. 438; *Henderson* v. *Astwood*, [1894] A. C. 150, P. C. (mortgagee selling by auction under power of sale cannot purchase the property himself); *Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.*, [1904] 1 K. B. 820, C. A. (landlord selling under a distress cannot be himself the purchaser). The effect of a purchase by a company of its own debentures is to extinguish the debt, because the company cannot be both debtor and creditor (*Re George Routledge & Sons, Ltd., Hummel* v. *George Routledge & Sons, Ltd.*, [1904] 2 Ch. 474; and see *Re W. Tasker & Sons, Hoare* v. *W. Tasker & Sons, Ltd.*, [1905] 2 Ch. 587, C. A.). A shipowner cannot charge freight in respect of the carriage of his own goods (*Keith* v. *Burrows* (1877), 2 App. Cas. 636; *Swan* v. *Barber* (1879), 5 Ex. D. 130, C. A.).

(*g*) *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174. Thus, a contract purporting to be made on behalf of a proposed company which is not at the time in existence is void so far as the future company is concerned, and cannot be ratified by the company when formed (*Re Northumberland Avenue Hotel Co.* (1882), 33 Ch. D. 16, C. A.; *Natal Land and Colonization Co.* v. *Pauline Colliery Syndicate*, [1904] A. C. 120, P. C.; *North Sydney Investment and Tramway Co.* v. *Higgins*, [1899] A. C. 263, P. C.; *Scott* v. *Ebury* (*Lord*) (1867), L. R. 2 C. P. 255; *Melhado* v. *Porto Alegre Rail. Co.* (1874), L. R. 9 C. P. 503; *Re Patent Ivory Manufacturing Co., Howard* v. *Patent Ivory Manufacturing Co.* (1887), 38 Ch. D. 156; and see *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146, C. A.; *Re Metal Constituents, Ltd., Lurgan's* (*Lord*) *Case*, [1902] 1 Ch. 707); *Re English and Colonial Produce Co., Ltd.*, [1906] 2 Ch. 435, C. A.; *Re National Motor Mail-Coach Co., Ltd., Clinton's Claim*, [1908] 2 Ch. 515, C. A., at p. 521; but the company may make a new contract adopting the terms of a contract made by the promoters either in whole or in part (*Re Patent Ivory Manufacturing Co., Howard* v. *Patent Ivory Manufacturing Co., supra; Re Dale and Plant, Ltd.* (1889), 61 L. T. 206; *Spiller* v. *Paris Skating Rink Co.* (1878), 7 Ch. D. 368), provided the new contract is one which may lawfully be made by the company (*Preston* v. *Liverpool, Manchester etc. Rail. Co.* (*Proprietors*) (1856), 5 H. L. Cas. 605). See title COMPANIES, Vol. V. Contracts of marine insurance form an exception to the rule stated in the text. Such a contract may be made on behalf of all persons interested in the property insured, and be effectively ratified by any person who is subsequently ascertained to have an interest (*Hayedorn* v. *Oliverson* (1814), 2 M. & S. 485). And see *Yzquierdo* v. *Clydebank Engineering and Shipbuilding Co.*, [1902] A. C. 524, as to the right of a successor in office to sue on a contract made by an officer of State in his official capacity. As to contracts on behalf of unincorporated associations, see p. 339, *post;* and as to bills and notes payable to bearer or to a fictitious or non-existent person, see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 472, 474.

(*h*) For instance, in the case of an advertisement offering a reward for services to be rendered (*Williams* v. *Carwardine* (1833), 4 B. & Ad. 621); see p. 349, *post.*

SECT. 2. Joint and Several Promises.

SECT. 2.—*Joint and Several Promises.*

Joint and several promises.

689. Any number of persons may join in making or accepting a promise. A promise made by several persons jointly is called a joint promise. Where several persons join in making a promise each of them is liable for the performance of the whole promise (*a*), but if one of them is sued alone on the promise he has a right to insist upon the others being joined as defendants with him (*b*). Whether the promise is made to several persons jointly or several persons join in making the promise, in either case there is only one debt or obligation, and performance made to or by one of the joint promisees or joint promisors, as the case may be, discharges the contract altogether (*c*).

Non-execution by a party.

690. Where a promise is intended to be made by several persons jointly, if any one of such persons fails to execute the agreement there is no contract, and no liability is incurred by such of them as have executed the agreement (*d*).

Similarly, where a promise is intended to be made to several persons jointly, if any of the joint promisees fail to execute the agreement the others cannot enforce it as a contract made with them alone (*e*); but in the case of a contract made by deed, a covenant may be enforced, notwithstanding that the deed has not been executed by some of the joint covenantees, in the absence of evidence that they did not assent to the covenant, for in such a case their assent is presumed from the fact that they join in suing on the covenant (*f*).

(*a*) *Cabell* v. *Vaughan* (1670), 1 Wms. Saund. 291; *Herries* v. *Jamieson* (1794), 5 Term Rep. 553; *Richards* v. *Heather* (1817), 1 B. & Ald. 29; *Mountstephen* v. *Brooke* (1818), 1 B. & Ald. 224; *King* v. *Hoare* (1844), 13 M. & W. 494, at p. 505; *Royal Albert Hall Corporation* v. *Winchilsea* (1891), 7 T. L. R. 362, C. A., *per* LINDLEY, L.J., at p. 364.

(*b*) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504, at p. 544; *Pilley* v. *Robinson* (1887), 20 Q. B. D. 155. But if the co-promisor is out of the jurisdiction and cannot be served with process, the action may be allowed to proceed without him. As to adding defendants, see R. S. C., Ord. 16, r. 11, and title PRACTICE AND PROCEDURE.

(*c*) See p. 410, *post*.

(*d*) *Underhill* v. *Horwood* (1804), 10 Ves. 209, at p. 226; *Latch* v. *Wedlake* (1840), 11 Ad. & El. 959; *Bonser* v. *Cox* (1841), 4 Beav. 379; *Evans* v. *Bremridge* (1856), 8 De G. M. & G. 100, C. A.; *McClean* v. *Kennard* (1874), 9 Ch. App. 336; *Royal Albert Hall Corporation* v. *Winchilsea* (1891), 7 T. L. R. 362, C. A., *per* KAY, L.J., at p. 366. Thus, an agreement which is executed by seven members of a syndicate consisting of eight persons is not binding on any of them (*Coopers* v. *United Contract Corporation* (1897), 14 T. L. R. 29). Nor is a joint and several guarantee which is signed by three only out of the four guarantors (*National Provincial Bank of England* v. *Brackenbury* (1906), 22 T. L. R. 797). Where one of the signatories of a joint and several bond in executing the instrument introduces a limitation of his liability to which the other parties have not agreed, there is no contract binding any of the signatories (*Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75; see p. 424, *post*). This rule has no application in the case of a contract made with a firm, for every partner is an agent of the other partners for the purpose of the firm's business, and has authority to enter into contracts on their behalf; see title PARTNERSHIP.

(*e*) *Wetherell* v. *Langston* (1847), 1 Exch. 634; *Hornsby* v. *Bird* (1869), 38 L. J. (CH.) 244.

(*f*) *Petrie* v. *Bury* (1824), 3 B. & C. 353; *Rose* v. *Poulton* (1831), 2 B. & Ad. 882; *Wetherell* v. *Langston*, *supra*.

SECT. 2. Joint and several Promises.

691. Where a promise is made to several persons jointly, they are entitled collectively to performance of it. Proceedings to enforce the performance of such a promise can only be taken in the names of all the joint promisees; one of them cannot sue alone, because the promise was made to all of them jointly, and not to any of them separately (*g*). Joint promisees.

Where a joint lease is made by two or more tenants in common, they must all join as plaintiffs in an action brought to enforce covenants made for the protection of their common interest, such as covenants to repair (*h*). If an entire rent is reserved by the lease it may be recovered in an action brought jointly by all the tenants in common; but if there is a separate reservation of rent to each of them a separate action must be brought by each to recover the rent that is due to him (*i*).

692. On the death of one of the persons by whom a joint promise has been made the liability devolves upon the survivors, the representatives of the deceased being under no liability (*k*); and on the death of one of several joint promisees the right of action on the promise vests in the survivors of them (*l*). In the case of a joint and several continuing guarantee, on the death of one of the sureties the survivor remains liable in respect of subsequent advances until notice is given by him to determine his liability (*m*). Death of joint party.

693. A promise is called a joint and several promise where several persons join in making a promise to the same person or persons, and at the same time each of them makes the same promise Joint and several promise.

(*g*) *Cabell* v. *Vaughan* (1670), 1 Wms. Saund. 291; *Scott* v. *Godwin*, (1797), 1 Bos. & P. 67; *Guidon* v. *Robson* (1809), 2 Camp. 302; *Jell* v. *Douglas* (1821), 4 B. & Ald. 374; *Hatsall* v. *Griffith* (1834), 2 Cr. & M. 679; *Heath* v. *Chilton* (1844), 12 M. & W. 632; *Petrie* v. *Bury* (1824), 3 B. & C. 353; *Chanter* v. *Leese* (1839), 5 M. & W. 698, Ex. Ch. The non-joinder of a necessary party will not defeat an action, and the names of any parties who ought to have been joined as plaintiffs may be added by order of the court or a judge at any stage of the proceedings (R. S. C., Ord. 16, r. 11). See title PRACTICE AND PROCEDURE.

(*h*) Littleton's Tenures, 314, 315, 316; Co. Litt. 198 a; *Foley* v. *Addenbrooke* (1843), 4 Q. B. 197; *Thompson* v. *Hakewill* (1865), 19 C. B. (N. S.) 713.

(*i*) *Powis* v. *Smith* (1822), 5 B. & Ald. 850.

(*k*) *Richards* v. *Heather* (1817), 1 B. & Ald. 29; *White* v. *Tyndall* (1888), 13 App. Cas. 263; *Clarke* v. *Bickers* (1845), 14 Sim. 639; *Calder* v. *Rutherford* (1822), 3 Brod. & Bing. 302; *Ashbee* v. *Pidduck* (1836), 1 M. & W. 564; *Re Maria Anna and Steinbank Coal and Coke Co., Hill's Case* (1875), L. R. 20 Eq. 585, 595. But in the administration of the estate of a deceased promisor a promise which in form is joint only and would be so construed at law may be construed as joint and several, and this equitable rule applies especially in the case of promises by partners. See *Beresford* v. *Browning* (1875), L. R. 20 Eq. 564; *Levy* v. *Sale* (1877), 37 L. T. 709; *Richardson* v. *Horton* (1843), 6 Beav. 185; *Devaynes* v. *Noble* (1816), 1 Mer. 530; *Sumner* v. *Powell* (1816), 2 Mer. 30; and title PARTNERSHIP.

(*l*) *Anderson* v. *Martindale* (1801), 1 East, 497; *Jell* v. *Douglas*, *supra*; *Martin* v. *Crompe* (1697), 1 Ld. Raym. 340; *Attwood* v. *Rattenbury* (1822), 6 Moore (C. P.), 579; *Rose* v. *Poulton* (1831), 2 B. & Ad. 822. A promise under seal to pay money to two or more persons jointly or to do any act for them implies an obligation to perform the act for the survivor or survivors of them (Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 60); see title REAL PROPERTY AND CHATTELS REAL.

(*m*) *Beckett* v. *Addyman* (1882), 9 Q. B. D. 783, C. A. See title GUARANTEE.

SECT. 2. Joint and several Promises.

separately to the same promisee. In such a case there are, in addition to the joint promise which is made by all of the promisors together, several promises made by each of them separately, and each of the promisors incurs both a joint and a several liability (*n*). All or any of the promisors may be sued, at the option of the promisee, in respect of a joint and several liability, and separate actions may be brought against each (*n*). In the event of the death of any of them, the personal representatives of the deceased are liable jointly and severally with the survivors (*o*).

Construction.

694. The question whether a particular promise is several or joint or both joint and several is one of construction, and depends upon the intention of the parties as expressed in the contract. Where several persons join in making a covenant, the rule is that the covenant is to be construed according to the ordinary meaning of the terms used by the parties, which is not to be departed from on considerations of hardship or inconvenience (*p*). No particular words are necessary to constitute a covenant of either kind—that is to say, either joint or several. If two persons covenant generally for themselves without any words of severance, or promise that they or one of them will do a thing, a joint liability is created; and if the covenantor's liability is to be confined to his own acts words of severalty must be added (*q*). If, however, the terms of the covenant are ambiguous it is to be construed according to

(*n*) *King* v. *Hoare* (1844), 13 M. & W. 494, at p. 505; *Beecham* v. *Smith* (1858), E. B. & E. 442; *Owen* v. *Wilkinson* (1858), 5 C. B. (N. S.) 526; *Re Jeffery, Ex parte Honey* (1871), 7 Ch. App. 178. As to joint and several guarantees, see title GUARANTEE; and as to the rights of the creditor on the bankruptcy of joint and several debtors, see title BANKRUPTCY AND INSOLVENCY, Vol. II., at pp. 218 *et seq.*

(*o*) *Burns* v. *Bryan or Martin* (1887), 12 App. Cas. 184; *Tippins* v. *Coates* (1853), 18 Beav. 401; *Church* v. *King* (1836), 2 My. & Cr. 220. And see p. 461, *post*. As to acknowledgment of debt by executor of deceased joint debtor, see *Read* v. *Price*, [1909] 1 K. B. 577.

(*p*) *Burns* v. *Bryan or Martin, supra; White* v. *Tyndall* (1888), 13 App. Cas. 263, *per* Lord FITZGERALD, at p. 275.

(*q*) *White* v. *Tyndall, supra, per* Lord HALSBURY, L.C., at p. 269, quoting with approval Platt on Covenants, p. 117; *Armstrong* v. *Cahill* (1880), 6 L. R. Ir. 440. Instances of covenants which have been construed as joint will be found in that case; see also *Collins* v. *Prosser* (1823), 1 B. & C. 682, and *Copland* v. *Laporte* (1835), 3 Ad. & El. 517. In *Mathewson's Case* (1597), 5 Co. Rep. 22 b, and *Lee* v. *Nixon* (1834), 1 Ad. & El. 201, the use of such a word as "severally" was held to show that the liability was not joint, but several; compare *Tyser* v. *Shipowners' Syndicate (Reassured)*, [1896] 1 Q. B. 135. For examples of a joint and several obligation, see *Northumberland (Duke)* v. *Errington* (1794), 5 Term Rep. 522; *Re Smith, Fleming & Co., Ex parte Harding* (1879), 12 Ch. D. 557, C. A.; *Sayer* v. *Chaytor* (1699), 1 Lut. 695; *Church* v. *King* (1836), 2 My. & Cr. 220; *Tippins* v. *Coates* (1853), 18 Beav. 401. The liability of the partners of a firm on contracts entered into by the firm is joint, not joint and several; but the estate of a deceased partner is also severally liable on such contracts so far as they remain unsatisfied (Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 9); see title PARTNERSHIP. The makers of a promissory note may be liable on it either jointly or jointly and severally, according to the tenor of the note; but the acceptors of a bill of exchange can only be liable jointly (Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 6, 85; see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., at p. 471. See also, as to joint and joint and several bonds, title BONDS, Vol. III., at p. 79.

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the interests of the parties—that is to say, if their interests are joint the covenant is to be construed as joint, and if their interests are several it is to be construed as imposing a several liability on each of the covenantors (*r*).

In the case of a promise which is made to several persons, the covenant will be moulded according to the interests of the covenantees; if their interests are joint the covenant will be construed as joint; and if their interests are several it will be construed as several (*s*). This rule of construction holds even where there is no ambiguity (*t*), and will be applied without regard to the language of the covenant, unless the terms of the covenant unequivocally show a contrary intention (*u*). A promise cannot be made to several persons both jointly and severally (*w*).

SECT. 3.—*Contracts with Unincorporated Associations.*

Clubs.

695. There are many kinds of voluntary associations which, being unincorporated and not being partnerships, have no legal entity, and therefore cannot as such enter into any contract. The most common instance is that of a members' club, which is an association of a peculiar nature (*a*). A club is not a partnership or an association for gain, and its members have no power as such to bind one another by contracts entered into on behalf of the club. The distinguishing feature of a club is that its members as such incur no liability to anyone beyond the amount of the subscription which is fixed by the rules (*b*). The affairs of such an association are managed by a committee, who have power to enter into contracts so as to bind the funds of the club, but not to pledge the credit of the members (*c*). Membership of the committee, however, does not in itself involve liability on such contracts. The question

(*r*) *Eccleston* v. *Clipsham* (1668), 1 Wms. Saund. 153; *Sorsbie* v. *Park* (1843), 12 M. & W. 146.

(*s*) *Slingsby's Case* (1587), 5 Co. Rep. 18 b, Ex. Ch.; *Eccleston* v. *Clipsham*, *supra*; *Anderson* v. *Martindale* (1801), 1 East, 497; *Southcote* v. *Hoare* (*Bart.*) (1810), 3 Taunt. 87; *Owston* v. *Ogle* (1811), 13 East, 538; *James* v. *Emery* (1818), 8 Taunt. 245, Ex. Ch.; *Withers* v. *Bircham* (1824), 3 B. & C. 254; *Servante* v. *James* (1829), 10 B. & C. 410; *Hatsall* v. *Griffith* (1834), 2 Cr. & M. 679; *Foley* v. *Addenbrooke* (1843), 4 Q. B. 197; *Mills* v. *Ladbroke* (1844), 7 Man. & G. 218; *Hopkinson* v. *Lee* (1845), 6 Q. B. 964; *Bradburne* v. *Botfield* (1845), 14 M. & W. 559; *Wakefield* v. *Brown* (1846), 9 Q. B. 209; *Magnay* v. *Edwards* (1853), 13 C. B. 479; *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537; *Haddon* v. *Ayres* (1858), 1 E. & E. 118; *Palmer* v. *Mallet* (1888), 36 Ch. D. 411, C. A.

(*t*) *Hopkinson* v. *Lee*, *supra*.

(*u*) *Bradburne* v. *Botfield*, *supra*. This rule of construction has no application to the case of covenantors; see *White* v. *Tyndall* (1888), 13 App. Cas. 263.

(*w*) *Slingsby's Case*, *supra*; *Eccleston* v. *Clipsham*, *supra*; *Withers* v. *Bircham*, *supra*; *Bradburne* v. *Botfield*, *supra*. As to the performance of contract generally, see p. 410, *post*. As to the transmission of liability in the case of the death of one of the promisors, see p. 337, *ante*; and as to the right of a joint promisor who has paid the whole amount due or more than his share of it to recover contributions from the other joint debtors, see p. 471, *post*, and titles GUARANTEE; PARTNERSHIP.

(*a*) See title CLUBS, Vol. IV., p. 420.

(*b*) *Wise* v. *Perpetual Trustee Co.*, [1903] A. C. 139, P. C.

(*c*) *Flemyng* v. *Hector* (1836), 2 M. & W. 172.

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of the liability in such cases is a question of principal and agent, and is governed by the rules which apply to contracts made through an agent (*d*). Thus, where work has been done or goods have been supplied to a club, the only persons who can be made liable on the contract are the persons who actually gave the order for the work or the goods in question, or who either expressly or impliedly authorised the giving of the order on their behalf, or who ratified the order after it had been given (*e*). A cricket or football club is in the same position as a social or political club with regard to contracts made on its behalf (*f*).

Charitable institutions.

696. The same principles apply to contracts made on behalf of unincorporated charitable institutions, such as hospitals (*g*), or societies like the Thimble League, which was formed by ladies with the object of providing clothing for the poor (*h*).

Volunteer corps.

A volunteer corps was another instance of a body which had no legal entity, and could not be bound as such even if every member of the corps joined in making the contract. The only way in which a binding contract could be made on behalf of such a body was by somebody pledging his personal liability on its behalf. If the person who contracted on behalf of the corps entered into the contract as an agent only, the contract could not be enforced by the other party, for the agent incurred no personal liability, and there could be no ratification of such a contract by the members of the corps, because the contract did not purport to be made on their behalf as individuals (*i*).

Building society.

697. A building society is not in the nature of a partnership, and the doctrine of principal and agent is applicable in the case of debts properly incurred by the directors for the ordinary purposes of the society. The liability in this case depends not on the terms of the contract of the members *inter se*, but on the fact that all the members are principals and the directors are their agents in relation to the necessary business of the society (*k*).

Associations for temporary purposes.

698. Voluntary associations of persons are frequently formed for the purpose of carrying out functions of a social character, such as a race meeting or regatta, a public dinner or a subscription dance,

(*d*) *Todd* v. *Emly* (1841), 8 M. & W. 505; *Steele* v. *Gourley* (1887), 3 T. L. R. 772, C. A. See title AGENCY, Vol. I., p. 145.

(*e*) For a full treatment of this subject, see title CLUBS, Vol. IV., p. 420.

(*f*) *Barnett and Scott* v. *Wood* (1888), 4 T. L. R. 278, C. A.; compare *Brown* v. *Lewis* (1896), 12 T. L. R. 455.

(*g*) *Glenester* v. *Hunter* (1831), 5 C. & P. 62; *Burls* v. *Smith* (1831), 7 Bing. 705; *Real and Personal Advance Co.* v. *Phalempin* (1893), 9 T. L. R. 569, C. A.

(*h*) *Royal Albert Hall Corporation* v. *Winchilsea* (1891), 7 T. L. R. 362, C. A.

(*i*) *Jones* v. *Hope* (1880), 3 T. L. R. 247, n., C. A. Other instances of contracts made on behalf of a volunteer corps are to be found in *Cross* v. *Williams* (1862), 7 H. & N. 675; *Hebbert & Co.* v. *Silver* (1892), 8 T. L. R. 234; *Samuel Brothers* v. *Whetherly*, [1907] 1 K. B. 709, affirmed [1908] 1 K. B. 184, C. A. The status of the former volunteer corps has been altered by recent legislation, and volunteer batallions are now merged in the Territorial Army (see title ROYAL FORCES), but it is submitted that as social bodies the rules as to their contracts stated above are still effective.

(*k*) *Re West London and General Permanent Benefit Building Society*, [1894] 2 Ch. 352. See title BUILDING SOCIETIES, Vol. III., p. 321.

SECT. 3. Contracts with Unincorporated Associations.

or the local celebration of events of national importance, such as the jubilee of the late Queen Victoria or the coronation of His Majesty King Edward VII. Such associations differ from clubs in that they are formed for a temporary purpose only and cease to exist as soon as that purpose has been carried out, and their proceedings are not usually governed by any special rules or regulations.

Associations of this kind have no legal entity, and cannot either sue or be sued on contracts made in their name or on their behalf. The liability for goods supplied or work done for them rests, as in the case of clubs, with the persons by whom or with whose authority the order for the goods or the work was given (*l*). A distinction is to be drawn as regards the inference of authority in such cases between the members of a provisional committee who merely lend the sanction of their names to the project and the members of the acting committee who are appointed for the purpose of carrying the scheme into effect (*m*).

School managers.

699. A resolution passed at a meeting of the managers of a school, who are not an incorporated body, in favour of the appointment of a particular candidate to the post of headmaster does not constitute a contract unless it is communicated by them to the selected candidate. Until that is done the managers reserve to themselves the power to reconsider their decision (*n*).

Credit given to particular fund.

700. In any of the cases above referred to, if the creditor looks for payment not to any of the members of the association, but to a particular fund, he can only have recourse to that fund and cannot make the members liable on the contract (*o*).

SECT. 4.—*Capacity of Parties.*

Capacity to contract.

701. *Primâ facie*, any person is capable of entering into a contract, but certain classes of persons are in law incompetent to contract, or are only capable of contracting to a limited extent or

(*l*) *Pilot* v. *Craze* (1888), 52 J. P. 311 (stewards of jubilee *fête*); *Hill* (*Lord Arthur*) v. *Lathom* (*Earl*) (1894), 10 T. L. R. 301 (executive council of Irish Exhibition in London). See also *Carrick's Case* (1851), 1 Sim. (N. S.) 505 (persons engaged in an attempt to form a limited company); *Cockerell* v. *Aucompte* (1857), 2 C. B. (N. S.) 440 (members of a coal club).

(*m*) *Reynell* v. *Lewis*. *Wyld* v. *Hopkins* (1846), 15 M. & W. 517; *Burnside* v. *Dayrell* (1849), 3 Exch. 224; *Maddick* v. *Marshall* (1864), 17 C. B. (N. S.) 829, Ex. Ch.; *Bright* v. *Hutton* (1852), 3 H. L. Cas. 341; *Norris* v. *Cottle* (1850), 2 H. L. Cas. 647; *Hutton* v. *Thompson* (1851), 3 H. L. Cas. 161; *Bailey* v. *Macaulay* (1849), 13 Q. B. 815; *Lake* v. *Argyll* (*Duke*) (1844), 6 Q. B. 477; *Pilot* v. *Craze*, *supra*. As to the liability of promoters of companies on contracts made in the course of promotion, see title COMPANIES, Vol. V.

(*n*) *Powell* v. *Lee* (1908), 99 L. T. 284.

(*o*) Thus, the minister of a Baptist church who was appointed by the deacons of the church at a weekly salary could not make the deacons liable for payment of his salary where he looked for payment to a fund subscribed by the members of the congregation and there was nothing to indicate that the deacons undertook to be personally liable for the payment (*Morley* v. *Makin* (1905), 54 W. R. 395). Compare *Coutts & Co.* v. *Irish Exhibition in London* (1891), 7 T. L. R. 313, C. A.; *Scott* v. *Ebury* (*Lord*) (1867), L. R. 2 C. P. 255.

SECT. 4. Capacity of Parties.

in a particular manner. A contract which has been entered into by such persons is in some cases void, so that no rights can be acquired under it by either party; in other cases the contract is voidable at the option of the party suffering from the disability or his representative, so that he has the right to enforce the contract if he chooses to do so. The most important instances of total or partial incapacity to contract are dealt with under separate titles, but there are certain cases which may conveniently be mentioned here (*a*).

Alien enemies.

702. No contract can be made with an alien enemy, that is to say, with a subject of a State with which this country is at war, during the continuance of the war, except in pursuance of a licence from the Crown, for all unlicensed trading with an alien enemy is illegal (*b*).

Convicts.

703. A person who has been convicted of treason or felony and sentenced to death or penal servitude is incapable of making any contract until he has served his term of imprisonment or received a pardon; but this disability is suspended while he is lawfully at large under a licence (*c*).

Drunkards.

704. A contract made by a person who was so drunk that he did not know what he was doing at the time when he entered into the contract is voidable at his option, but is not void (*d*). Such a contract is on the same footing as a contract made by a person of unsound mind (*e*). The person seeking to avoid the contract must prove that his condition was known to the other party at the time when the contract was made (*f*).

A person who by reason of drunkenness is incompetent to contract is liable for the reasonable price of necessaries sold and delivered to him (*g*).

SECT. 5.—*Rights and Liabilities of Strangers to the Contract.*

Strangers to contract.

705. As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party,

(*a*) For the full treatment of this subject, see titles BANKRUPTCY, Vol. II., p. 268; HUSBAND AND WIFE; INFANTS AND CHILDREN; LUNATICS AND PERSONS OF UNSOUND MIND. Particular rules are also applicable in the case of corporations, companies, and partnerships, and are dealt with under those respective titles.

(*b*) See titles ALIENS, Vol. I., p. 310; CONFLICT OF LAWS, Vol. VI., p. 232.

(*c*) Forfeiture Act, 1870 (33 & 34 Vict. c. 23), ss. 8, 30; see title CRIMINAL LAW AND PROCEDURE.

(*d*) *Gore* v. *Gibson* (1845), 13 M. & W. 623; *Matthews* v. *Baxter* (1873), L. R. 8 Exch. 132; *Say* v. *Barwick* (1812), 1 Ves. & B. 195; *Shaw* v. *Thackray* (1853), 1 Sm. & G. 537.

(*e*) *Molton* v. *Camroux* (1849), 4 Exch. 17, Ex. Ch.; see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*f*) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599, C. A.; *Cooke* v. *Clayworth* (1811), 18 Ves. 12 (intoxication not *per se* a ground for relief in equity).

(*g*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2. "Necessaries" here means goods suitable to his condition in life and to his actual requirements at the time of the sale and delivery. See title INFANTS AND CHILDREN.

even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it (*h*). The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract (*i*).

Conditions.

706. Conditions cannot be imposed on a contract for the sale of goods so as to bind persons who may purchase the goods from the original buyer and be enforceable against them by the original seller, even if the conditions are brought to the notice of the ultimate buyers at the time of the sale to them (*j*).

Alternative remedies.

707. In many cases the breach of a duty arising out of a contract may be treated either as a breach of contract or as a tort at the option of the party injured. This does not enable a person who is not a party to the contract to sue for the breach of a duty arising out of the contract where the claim is in substance one for breach of contract (*k*); but if he has a cause of action independently of the contract, he is not precluded from suing in tort (*l*).

Articles of association.

708. The articles of association of a limited company are an agreement *inter socios*, and cannot be enforced against the company by an outsider, even if they contain a provision intended for his benefit, because they do not constitute a contract between him and the company (*m*).

Officers of societies.

709. An unincorporated association or society cannot authorise an officer to sue or be sued on their behalf upon contracts made by them, even if their rules purport to give them power to do

(*h*) *Schmaling* v. *Thomlinson* (1815), 6 Taunt. 147; *Price* v. *Easton* (1833), 4 B. & Ad. 433; *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393; *Playford* v. *United Kingdom Telegraph Co.* (1869), L. R. 4 Q. B. 706; *Dickson* v. *Reuter's Telegraph Co.* (1877), 2 C. P. D. 62; *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147, C. A.; *Fleming* v. *Bank of New Zealand*, [1900] A. C. 577, P. C.; *Keighley, Maxsted & Co.* v. *Durant*, [1901] A. C. 240; *Cavalier* v. *Pope*, [1906] A. C. 428; *Cameron* v. *Young*, [1908] A. C. 176; compare *Yzquierdo* v. *Clydebank Engineering and Shipbuilding Co.*, [1902] A. C. 524. Where by a contract which is scheduled to and confirmed by a local and personal Act of Parliament obligations are imposed on two railway companies for the benefit of the public, such obligations are to be regarded as statutory and not merely contractual, so that third parties for whose benefit the obligations were imposed are entitled to enforce them (*Davis & Sons* v. *Taff Vale Rail. Co.*, [1895] A. C. 542). As to the assignment of rights under a contract, see p. 495, *post*.

(*i*) *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393; *Cavalier* v. *Pope*, [1906] A. C. 428 (injury to wife of tenant through breach by landlord of agreement to execute repairs).

(*j*) *McGruther* v. *Pitcher*, [1904] 2 Ch. 306, C. A., following *Taddy & Co.* v. *Sterious & Co.*, [1904] 1 Ch. 354.

(*k*) *Alton* v. *Midland Rail. Co.* (1865), 19 C. B. (N. S.) 213.

(*l*) *Taylor* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, [1895] 1 Q. B. 134, C. A.; *Meux* v. *Great Eastern Rail. Co.*, [1895] 2 Q. B. 387, C. A. See titles NEGLIGENCE; TORT.

(*m*) *Melhado* v. *Porto Alegre Rail. Co.* (1874), L. R. 9 C. P. 503; *Eley* v. *Positive Government Security Life Assurance Co.* (1876), 1 Ex. D. 88, C. A.; *Re Rotherham Alum and Chemical Co.* (1883), 25 Ch. D. 103, C. A.; *Browne* v. *La Trinidad* (1887), 37 Ch. D. 1, C. A.

SECT. 5. Rights and Liabilities of Strangers to the Contract.

so (*n*). In some cases, however, this power has been expressly conferred by Act of Parliament (*o*).

Agency.

710. The rule above stated is subject to an exception in the case of a contract made by an agent on behalf of an undisclosed principal, who is, as a general rule, entitled to sue and liable to be sued on it (*p*). Where a contract is entered into by an agent on behalf of a disclosed principal, generally speaking the principal alone can sue or be sued on the contract; but in certain cases the agent is entitled to sue and liable to be sued (*q*).

Cestui que trust.

711. Another exception to the rule is recognised in cases where the contract is intended to secure a benefit to a person who is not a party to it (for instance, in the case of a marriage settlement), so that he has a beneficial right as *cestui que trust* under the contract. In such a case the person for whose benefit the contract was made is allowed in equity to enforce it (*r*). An agreement to pay money to a third person out of certain property may amount to a declaration of trust as distinguished from a mere covenant to pay money, and may in that case be enforced by him although he is not a party to the contract (*s*).

Money had and received.

712. Where a person has received money from another for the purpose of its being paid over by him to a third person, and has admitted to such third person that he holds the money on these terms, the money can be recovered from him by the third person as money had and received to his use. In such a case the person who has received the money has constituted himself the agent of the third person, and no further consideration is necessary between them (*t*).

(*n*) *Gray* v. *Pearson* (1870), L. R. 5 C. P. 568; *Evans* v. *Hooper* (1875), 1 Q. B. D. 45, C. A. See p. 339, *ante*.

(*o*) *E.g.*, in the case of joint stock banking companies, Country Bankers Act, 1826 (7 Geo. 4, c. 46), ss. 4, 9; Companies Act, 1862 (25 & 26 Vict. c. 89), Sched. III., Part II.; Banking Co-partnerships Act, 1864 (27 & 28 Vict. c. 32); trade unions, Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 9; friendly societies, Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 94. And see titles BANKERS AND BANKING, Vol. I., p. 573; COMPANIES, Vol. V.; FRIENDLY SOCIETIES; TRADE AND TRADE UNIONS.

(*p*) See title AGENCY, Vol. I., p. 145. If, however, the contract is made by deed, the principal can acquire no right unless he is a party to the deed; see p. 333, *ante*.

(*q*) For instance, where he contracts in his own name or where he has a special interest in the subject-matter of the contract, as in the case of an auctioneer or a factor: see title AGENCY, Vol. I., p. 145.

(*r*) *Gale* v. *Gale* (1877), 6 Ch. D. 144; *Re Rotherham Co.* (1882), 25 Ch. D. 103; *Gandy* v. *Gandy* (1885), 30 Ch. D. 57, C. A.; *Drimmie* v. *Davies*, [1899] 1 I. R. 176, 186, C. A.; *Gregory* v. *Williams* (1817) 3 Mer. 582; and see title TRUSTS AND TRUSTEES. As to building schemes, reference may be made to *Elliston* v. *Reacher*, [1908] 2 Ch. 374.

(*s*) *Re Empress Engineering Co.* (1880), 16 Ch. D. 125, C. A.; *Re Flavell*, *Murray* v. *Flavell*, (1883), 25 Ch. D. 89, C. A. See titles SETTLEMENTS; TRUSTS AND TRUSTEES.

(*t*) *Williams* v. *Everett* (1811), 14 East, 582; *Yates* v. *Bell* (1820), 3 B. & Ald. 643; *Baron* v. *Husband* (1833), 4 B. & Ad. 611; *Lilly* v. *Hays* (1836), 5 Ad. & El. 548; *Orr* v. *Union Bank of Scotland* (1854), 1 Macq. 513; *Moore* v. *Bushell* (1857), 27 L. J. (EX.) 3; *Griffin* v. *Weatherby* (1868), L. R. 3 Q. B. 753; *Hodgson* v. *Anderson* (1825), 3 B. & C. 842; *Crowfoot* v. *Gurney* (1832), 9 Bing. 372; *Robertson* v. *Fauntleroy* (1823), 8 Moore (C. P.), 10; *Walker* v. *Rostron* (1842),

SECT. 5. Rights and Liabilities of Strangers to the Contract.

713. In the case of a contract for the carriage of goods the contract is, in the absence of express agreement, considered to be made between the carrier and the person at whose risk the goods are carried, who is in most cases the consignee (*u*). This case, therefore, is no exception to the general rule.

Procuring breach of contract.

714. A stranger to a contract, though not liable to be sued on the contract itself, may incur a liability in tort if he wrongfully, either alone or in combination with other persons, induces one of the parties to break the contract and thereby causes damage to the other party (*v*). It is now clear, in the case of a combination of two or more persons to procure a breach of contract, that the absence of malice and the desire to benefit the party who is induced to break the contract constitute no defence (*w*); and probably the same rule would be held to apply where the breach is knowingly procured by a person not acting in concert with anyone else (*x*). The principle is not confined to contracts involving the relationship of master and servant (*y*).

Part III.—Formation of Contract.

SECT. 1.—*Offer and Acceptance.*

Offer and acceptance.

715. In order to constitute a contract there must be an offer made by one person to another, and an acceptance of that offer by the person to whom it was made (*a*).

SUB-SECT. 1.—*Offer.*

Definition.

716. An offer, or, as it is sometimes called, a proposal, means the signification by one person to another of his willingness to enter

9 M. & W. 411; *Noble* v. *National Discount Co.* (1860), 5 H. & N. 225; *Hamilton* v. *Spottiswoode* (1849), 4 Exch. 200; *Hill* v. *Royds* (1869), L. R. 8 Eq. 290; *Field* v. *Megaw* (1869), L. R. 4 C. P. 660. See p. 473, *post*.

(*u*) *Dawes* v. *Peck* (1799), 8 Term Rep. 330; *Dutton* v. *Solomonson* (1803), 3 Bos. & P. 582; *Fragano* v. *Long* (1825), 4 B. & C. 219; *Dunlop* v. *Lambert* (1839), 6 Cl. & Fin. 600, H. L. But the consignee cannot sue on the contract unless the property in the goods has passed to him (*Coombs* v. *Bristol and Exeter Rail. Co.* (1858), 3 H. & N. 510). And see title CARRIERS, Vol. IV., p. 1.

(*v*) *Lumley* v. *Gye* (1853), 2 E. & B. 216; *Bowen* v. *Hall* (1881), 6 Q. B. D. 333, C. A.; *Temperton* v. *Russell*, [1893] 1 Q. B. 715, C. A.; *Quinn* v. *Leathem*, [1901] A. C. 495; *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, [1903] 2 K. B. 600, C. A.; *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A. C. 239; reference may be made to *Conway* v. *Wade*, [1908] 2 K. B. 844, C. A.; *Smithies* v. *National Association of Operative Plasterers*, [1909] 1 K. B. 310, C. A.; *Jose* v. *Metallic Roofing Co. of Canada* (1908), 78 L. J. (P. C.) 36. For a more detailed treatment of this subject, see title TORTS; and as to its application to trade unions, see title TRADE AND TRADE UNIONS.

(*w*) *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, *supra*.

(*x*) See *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, *supra*.

(*y*) *Quinn* v. *Leathem*, *supra*; *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335, C. A.; *Lumley* v. *Gye*, *supra*; *Bowen* v. *Hall*, *supra*; *Temperton* v. *Russell*, *supra*.

(*a*) *Broyden* v. *Metropolitan Rail. Co.* (1877), 2 App. Cas. 666, *per* Lord BLACKBURN, at p. 691; *Mozley* v. *Tinkler* (1835), 1 Cr. M. & R. 692; *Re National Savings Bank Association* (*Hebb's Case*) (1867), L. R. 4 Eq. 9.

SECT. 1. Offer and Acceptance.

into a contract with him on certain terms. It may be express or may be implied from the conduct of the party.

Declaration of intention.

A mere statement of a person's intention or a declaration of his willingness to enter into negotiations is not an offer, and cannot be accepted so as to form a binding contract (*b*). Thus, an advertisement of a sale by auction is not an offer binding the auctioneer to submit the lots for sale (*c*), nor is an an nouncement that a competition will be held an offer of the prize to the competitor who obtains the highest marks (*d*). Nor does an intimation to an individual of the lowest price at which goods will be sold necessarily amount to an offer to sell him the goods at that price (*e*).

Tenders.

An advertisement inviting tenders for the supply of goods extending over a period of time is not an offer, but an invitation for offers. A tender for the supply of such goods as may be required, no quantity being specified, is not an offer which may be accepted generally so as to form a binding contract, but is a continuing offer, which is accepted from time to time whenever an order is given for any of the goods specified in the tender (*f*). An acceptance

(*b*) *E.g.*, a statement by B. to the father of A. that he would give £100 to the man who married his daughter with his consent was held not to be an offer on which a contract could be founded, since it did not appear to have been intended to form the basis of a contract (*Week* v. *Tibold* (1605), 1 Roll. Abr. tit. Action sur Case (M); compare *Moorhouse* v. *Colvin* (1851), 15 Beav. 341). A letter written by a father to the man who was about to marry his daughter, in which he stated that she would have a share of what he left after the death of her mother, was held to amount merely to a statement of his intention to give her something at his death (*Re Fickus, Farina* v. *Fickus*, [1900] 1 Ch. 331). See also *Licences Insurance Corporation and Guarantee Fund* v. *Lawson* (1896), 12 T. L. R. 501. In all such cases it is a question of intention whether the statement or declaration is to be considered a definite offer which can be converted into a promise by acceptance. A promise to "favourably consider" an application for the renewal of a contract at its expiration does not amount to a binding agreement (*Montreal Gas Co.* v. *Vasey*, [1900] A. C. 595, P. C.). An agreement to engage an actress at a salary to be mutually agreed upon is not a binding contract until the salary has been agreed (*Loftus* v. *Roberts* (1902), 18 T. L. R. 532, C. A.).

(*c*) *Harris* v. *Nickerson* (1873), L. R. 8 Q. B. 286. But the highest *bonâ fide* bidder at an auction may, perhaps, sue the auctioneer as upon an implied contract that the sale shall be without reserve (*Warlow* v. *Harrison* (1858), 1 E. & E. 295, Ex. Ch.). See title AUCTION AND AUCTIONEERS, Vol. I., p. 511.

(*d*) *Rooke* v. *Dawson*, [1895] 1 Ch. 487.

(*e*) *Harvey* v. *Facey*, [1893] A. C. 552, P. C.; *Boyers & Co.* v. *Duke*, [1905] 2 I. R. 617. But a quotation of a certain quantity at a certain price, "usual Plate terms," coupled with the observation "I shall be glad to hear if you are buyers," is an offer (*Philp & Co.* v. *Knoblauch*, [1907] S. C. 994). A circular announcing that stock in trade will be sold by tender, and that the tenders will be received and opened on a certain date, is not an offer to sell, and, therefore, cannot be accepted by sending in the highest tender (*Spencer* v. *Harding* (1870), L. R. 5 C. P. 561). An announcement in a railway company's time tables that a train will start at a particular time may be framed in such a manner as to bind the company if an intending passenger takes a ticket on the faith of such announcement (*Denton* v. *Great Northern Rail. Co.* (1856), 5 E. & B. 860; see, however, *Lockyer* v. *International Sleeping Car and European Express Trains Co.* (1892), 61 L. J. (Q. B.) 501). Railway companies almost invariably give notice that they do not warrant the departure or arrival of the trains at the times specified in their time tables.

(*f*) *Great Northern Rail. Co.* v. *Witham* (1873), L. R. 9 C. P. 16; *R.* v. *Demers*, [1900] A. C. 103, P. C.; *Re Gloucester Municipal Election Petition*, 1900, *Ford* v. *Newth*, [1901] 1 K. B. 683; see also *Burton* v. *Great Northern Rail. Co.* (1854), 9 Exch. 507.

of such a tender merely amounts to an intimation that the offer will be considered to remain open during the period specified, and that it will be accepted from time to time by orders for specific quantities, and does not bind either party unless and until such orders are given (*g*). But a tender may be so worded as to impose an obligation on the person who accepts it to order all the goods that he requires for a particular business or purpose during the period specified from the person whose tender has been accepted, provided it is sufficiently specified what the terms of the contract and the obligations of the parties are (*h*).

An offer must be made by a definite person, but may be made to an indefinite number of persons (*i*).

Duration of offer.

717. An offer remains open, that is to say can be accepted, during the time (if any) expressly or impliedly mentioned in the offer, or, if no time is mentioned, during a reasonable time having regard to the nature and circumstances of the offer, provided that it has not in the meantime been revoked (*j*).

How determined.

An offer is determined by the lapse of the time during which it is to remain open (*k*); by the death or insanity of the person by whom it was made, if the fact of his death or insanity comes to the knowledge of the person to whom the offer was made before he has accepted it (*l*), or by his bankruptcy if the offer relates to his property (*m*); by the rejection or qualified acceptance of the offer by the person to whom it was made (*n*).

Revocation.

718. An offer may be revoked at any time before it has been accepted, provided that the revocation is communicated to the person to whom the offer was made (*o*).

(*g*) See cases referred to in note (*f*), p. 346, *ante*.

(*h*) *Islington Union* v. *Brentnall and Cleland* (1907), 71 J. P. 407.

(*i*) For instance, an advertisement of a reward to be paid to any person who will give certain information to the advertiser is made to the world at large, and can be accepted by anyone who gives the required information (*Williams* v. *Carwardine* (1833), 4 B. & Ad. 621; see *Spencer* v. *Harding* (1870), L. R. 5 C. P. 561; and judgment of BOWEN, L.J., in *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, C. A.). An offer of a reward to anyone discovering the secret of a certain trick was held to have been won by two persons found by the jury to have discovered the secret (*Maskelyne* v. *Stollery* (1899), 16 T. L. R. 97, H. L.).

(*j*) *Meynell* v. *Surtees* (1855), 1 Jur. (N. S.) 737; *Ramsgate Victoria Hotel Co.* v. *Montefiore* (1866), L. R. 1 Exch. 109.

(*k*) *Ramsgate Victoria Hotel Co.* v. *Montefiore*, *supra*.

(*l*) *Dickinson* v. *Dodds* (1876), 2 Ch. D. 463, C. A., *per* MELLISH, L.J., at p. 475; see also *Blades* v. *Free* (1829), 9 B. & C. 167; *Thomson* v. *James* (1855), 18 Dunl. (Ct. of Sess.) 1; *Drew* v. *Nunn* (1879), 4 Q. B. D. 661, C. A.

(*m*) *Meynell* v. *Surtees* (1855), 25 L. J. (CH.) 257.

(*n*) A qualified acceptance amounts in effect to a counter-offer, which in its turn requires acceptance by the person who made the original offer; see p. 350, *post*.

(*o*) *Offord* v. *Davies* (1862), 12 C. B. (N. S.) 748; *Byrne* v. *Van Tienhoven* (1880), 5 C. P. D. 344; *Stevenson* v. *McLean* (1880), 5 Q. B. D. 346. A bidder at an auction may withdraw his bid at any time before the hammer falls, even if there is a condition that no bidder shall retract his bidding (*Payne* v. *Cave* (1789), 3 Term Rep. 148; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58). As to the revocation of an offer which has been made through the post, see p. 354, *post*.

SECT. 1. **Offer and Acceptance.**

Keeping open.

The fact that the person by whom the offer was made has agreed to keep it open for a specified time does not preclude him from revoking the offer before the expiration of that time if it has not been accepted, unless there was valuable consideration for the agreement to keep the offer open (*p*).

Revocation by conduct.

The revocation need not be made in the form of an express withdrawal of the offer; any act done by the person making the offer which is inconsistent with his keeping the offer open amounts to a revocation of the offer as soon as it comes to the knowledge of the person to whom the offer was made (*q*). An offer made in writing may be revoked by word of mouth (*r*).

SUB-SECT. 2.—*Acceptance.*

Mode of acceptance.

719. Acceptance means the assent of the person to whom an offer is made, signified in the mode required by the terms of the offer. Where no particular mode of acceptance is expressly required, the offer can be accepted in such manner as may be implied by the nature of the offer (*s*). Thus, an offer may, according to circumstances, be accepted by the communication of the assent of the person to whom it is made, or by his doing some act which he is requested by the terms of the offer to do (*t*), or by his accepting

(*p*) *Cooke* v. *Oxley* (1790), 3 Term Rep. 653; *Routledge* v. *Grant* (1828), 4 Bing. 653; *Head* v. *Diggon* (1828), 3 Man. & Ry. (K. B.) 97; *Dickinson* v. *Dodds* (1876), 2 Ch. D. 463, C. A.; *Bristol, Cardiff and Swansea Aërated Bread Co.* v. *Maggs* (1890), 44 Ch. D. 616. A continuing guarantee, not given under seal, for future advances to be made to a third person, if not so framed as to become operative before it is acted on, may be revoked or withdrawn altogether before being acted on, and as to further or future transactions may be terminated at any time unless the contrary be expressly stipulated (*Offord* v. *Davies* (1862), 12 C. B. (N. S.) 748; *Re Crace, Balfour* v. *Crace*, [1902] 1 Ch. 733). There being no consideration to make the guarantee binding on the guarantor before an advance is made, the guarantee is a continuing offer which is accepted by each advance made to the amount of the advance, and is revocable at any time in regard to future advances (*Westhead* v. *Sproson* (1861), 6 H. & N. 728). Under ordinary circumstances a continuing guarantee is revoked as to future advances by notice of the death of the guarantor (*Coulthart* v. *Clementson* (1879), 5 Q. B. D. 42; but see the judgments of the Court of Appeal in *Re Sherry, London and County Banking Co.* v. *Terry* (1884), 25 Ch. D. 692, C. A., where the principle is considered open to doubt); and for exceptional cases and treatment of the subject generally in greater detail, see title GUARANTEE. As to letters of credit, see *Re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* (1867), 2 Ch. App. 391; *Maitland* v. *Chartered Mercantile Bank of India, London and China* (1869), 38 L. J. (CH.) 363; *Union Bank of Canada* v. *Cole* (1877), 47 L. J. (Q. B.) 100, C. A.).

(*q*) *Dickinson* v. *Dodds* (1876), 2 Ch. D. 463, C. A.

(*r*) *Re Natal Investment Co., Wilson's Case* (1869), 20 L. T. 962; *Re Brewery Assets Corporation, Truman's Case*, [1894] 3 Ch. 272.

(*s*) *Household Fire Insurance Co.* v. *Grant* (1879), 4 Ex. D. 216, C. A.; *Henthorn* v. *Fraser*, [1892] 2 Ch. 27, C. A. As to the acceptance of an offer made through the post, see p. 352, *post*.

(*t*) For instance, the offer of a railway company to carry passengers is accepted by anyone who takes a ticket (*Denton* v. *Great Northern Rail. Co.* (1856), 5 E. & B. 860). As to how far a person taking a ticket is bound by the conditions printed thereon, see title CARRIERS, Vol. IV., pp. 54, 58. Entering for a yacht race subject to rules providing that the competitors shall be liable for all damages arising from a breach thereof is an acceptance of the provisions of the rules, and renders a competitor liable as between himself and the other competitors to

Communication.

some act which the person making the offer has offered to do in return for his promise (*u*). It is necessary that the person accepting an offer should notify his acceptance to the person making it, except where the offer is made in consideration of some act to be done by the person to whom it is made, and a notification of his acceptance of the terms of the offer is expressly or impliedly dispensed with by the person making the offer (*x*). Where a notification is not dispensed with expressly, the question whether it is to be deemed to be dispensed with by implication is a question of intention depending on the nature and terms of the offer and the circumstances of the particular case (*x*).

Where the language of an offer leaves it doubtful whether the person making it intends to be legally bound thereby, the person to whom the offer is made cannot safely rely upon performance of the act requested by the terms of the offer as constituting acceptance without giving notice to the person who made the offer that it is regarded by him as a binding offer (*a*).

Estoppel.

If, whatever a man's real intention may be, he so conducts

pay for all damage caused by a breach of the rules without taking advantage of the statutory limitation of liability for damage by collision (*Clarke* v. *Dunraven* (*Earl*), *The Satanita*, [1897] A. C. 59). An offer of a reward to any person who will give certain information is accepted by giving the information required, even if the information is not given with the object of earning the reward (*Williams* v. *Carwardine* (1833), 4 B. & Ad. 621; *England* v. *Davidson* (1840), 11 Ad. & El. 856; *Tarner* v. *Walker* (1867), L. R. 2 Q. B. 301, Ex. Ch.; *Bent* v. *Wakefield Bank* (1878), 4 C. P. D. 1; *Thatcher* v. *England* (1846), 3 C. B. 254; *Smith* v. *Moore* (1845), 1 C. B. 438). It has even been held in one case that the reward can be earned by a person who gives the required information, although at the time when he gave the information he did not know that an offer to pay a reward had been made, but the soundness of this decision is open to question (*Gibbons* v. *Proctor* (1891), 64 L. T. 594). In *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, C. A., it was held that an offer of a sum of money to any person who should contract a disease after using a certain remedy for a specified time was accepted by a person who after using the remedy for that time contracted the disease. See also *Re Agra and Masterman's Bank*, *Ex parte Asiatic Banking Corporation* (1867), 2 Ch. App. 391). A bidding at a sale by auction is accepted by knocking down the hammer (*Payne* v. *Cave* (1789), 3 Term Rep. 148).

(*u*) Where an offer contains an intimation that acceptance will be presumed if no reply is received, the mere absence of a reply is not an acceptance of the offer (*Felthouse* v. *Bindley* (1862), 11 C. B. (N. S.) 869; *Re Empire Assurance Corporation, Somerville's Case* (1871), 40 L. J. (CH.) 431).

(*x*) *Meynell* v. *Surtees* (1855), 25 L. J. (CH.) 257; *Brogden* v. *Metropolitan Rail. Co.* (1877), 2 App. Cas. 666, at pp. 691, 692; *Powell* v. *Lee* (1908), 99 L. T. 284; *Carlill* v. *Carbolic Smoke Ball Co.*, *supra*; *M'Iver* v. *Richardson* (1813), 1 M. & S. 557; *Mozley* v. *Tinkler* (1835), 1 Cr. M. & R. 692. In *Wilby* v. *Elgee* (1875), L. R. 10 C. P. 497, where the defendant had promised to pay a doubtful claim if the plaintiff would let it stand over, and the plaintiff had forborne to sue for three years, it was held that by merely not suing she had in effect communicated her acceptance of the defendant's offer.

(*a*) Thus, a statement that the defendant had no objection to guarantee the plaintiff against loss incurred by giving credit to a third person cannot after a considerable period be made available as a guarantee, where no notice has been given that it was so regarded by the plaintiffs and the defendant has not consented that it should be a conclusive guarantee (*M'Iver* v. *Richardson* (1813), 1 M. & S. 557; *Mozley* v. *Tinkler* (1835), 1 Cr. M. & R. 692). As to ambiguous acceptances, see *Appleby* v. *Johnson* (1874), L. R. 9 C. P. 158, and cases under title SALE OF LAND.

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himself that a reasonable man would believe that he was assenting to the terms proposed, and the person making the offer acts upon that belief, the man thus conducting himself is bound by the contract as if he had intended to agree to the other party's terms (*b*).

Mere mental assent to the terms of an offer is not an acceptance of it (*c*), but acceptance may be implied from the conduct of the party.

Qualified acceptance.

720. In order to constitute acceptance the assent to the terms of an offer must be absolute and unqualified (*d*). If the acceptance is conditional, or any fresh term is introduced by the person to whom the offer is made, his expression of assent amounts to a counter-offer, which in turn requires to be accepted by the person who made the original offer (*e*).

(*b*) *Smith* v. *Hughes* (1871), L. R. 6 Q. B. 597, *per* BLACKBURN, J., at p. 607; *Freeman* v. *Coole* (1848), 2 Exch. 654. See title ESTOPPEL.

(*c*) *Brogden* v. *Metropolitan Rail. Co.* (1877), 2 App. Cas. 666, *per* Lord BLACKBURN, at p. 691; *Household Fire Insurance Co.* v. *Grant* (1879), 4 Ex. D. 216, C. A., *per* THESIGER, L.J., at p. 221. A resolution passed at a meeting of school managers in favour of the appointment of a particular candidate as a teacher does not constitute a contract unless it is communicated by them to the selected candidate (*Powell* v. *Lee* (1908), 99 L. T. 284).

(*d*) *Appleby* v. *Johnson* (1874), L. R. 9 C. P. 158. Thus, an agreement to grant an underlease is not an acceptance of an offer requiring an assignment of a lease (*Holland* v. *Eyre* (1825), 2 Sim. & St. 194). A letter containing a warranty that a mare is quiet in double harness is not an acceptance of an offer requiring a warranty that she is quiet in harness (*Jordan* v. *Norton* (1838), 4 M. & W. 155). An allotment of partly-paid shares in a company is not an acceptance of an application for fully-paid shares (*Re United Ports and General Insurance Co., Wynne's Case* (1873), 8 Ch. App. 1002). An allotment of shares on which the amount credited is proportionate to the net assets of the company is not an acceptance of an application for half paid-up shares, and an application for certificates of the shares by the allottee is not an acceptance of the new terms offered (*Re United Ports and General Insurance Co., Beck's Case* (1874), 9 Ch. App. 392; and see *Re Empire Assurance Corporation, Challis's Case* (1871), 6 Ch. App. 266; *Routledge* v. *Grant* (1828), 4 Bing. 653; *Warner* v. *Willington* (1856), 3 Drew. 523; *South Hetton Coal Co.* v. *Haswell, Shotton, and Easington Coal and Coke Co.*, [1898] 1 Ch. 465, C. A.; see also title COMPANIES, Vol. V.). An order for a certain quantity or quality of goods is not accepted by sending a different quantity or quality, or by delivering the goods by instalments (*Hutchison* v. *Bowker* (1839), 5 M. & W. 535; *Hart* v. *Mills* (1846), 15 M. & W. 85; *Cunliffe* v. *Harrison* (1851), 6 Exch. 903; *Levy* v. *Green* (1859), 1 E. & E. 969, Ex. Ch.). In such a case the buyer has the option of rejecting the goods, but if he elects to accept them he must, subject to any usage of trade, special agreement, or course of dealing between the parties, pay for them at the contract rate (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 30, 31). See also title SALE OF GOODS.

(*e*) Thus, in the case of a contract of insurance, if the proposal contains the whole of the terms of the contract, the execution of the policy by the insurance company amounts to an acceptance of the terms contained in the proposal (*Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296; *Roberts* v. *Security Co.*, [1897] 1 Q. B. 111, C. A.). Where, however, the proposal does not state the amount of the premium to be paid, if the insurance company accept the proposal and state the premium, this amounts to a counter-offer on their part (*Canning* v. *Farquhar* (1886), 16 Q. B. D. 727, C. A., *per* LINDLEY, L.J., at p. 733). An allotment of shares in a company is not an acceptance of an application for the shares if a new term is introduced by the company imposing forfeiture on non-payment of the amount payable on the shares (*Jackson* v. *Turquand* (1869), L. R. 4 H. L. 305; see also *Lucas* v. *James* (1849), 7 Hare, 410; *Star Fire and Burglary Insurance Co.* v. *Davidson & Sons* (1902), 5 F. (Ct. of Sess.) 83).

Entry in broker's books.

Bought and sold notes.

721. Where a broker is employed by both buyer and seller, a signed memorandum of a contract in his book is sufficient evidence of an offer and acceptance by the parties, and the validity of the contract thereby formed is not necessarily affected by the circumstance that the bought and sold notes sent to the parties do not agree (*f*). In the absence of such a memorandum in his book, the contract is formed by the bought and sold notes, and if they do not substantially agree there is no binding contract (*g*). If the broker is employed by the seller only, the contract is formed by means of the note sent by him to and accepted by the buyer, and in such case a variation between that note and the one sent by him to his principal is immaterial (*h*).

Conditions.

722. Where there is a definite acceptance of an offer, the fact that it is accompanied by a statement that the acceptor desires that the arrangement should be put into a more formal shape does not relieve either party from his liability under the contract (*i*). But if the acceptance is made subject to certain conditions then specified or to be specified by the acceptor or by some other person on his behalf, then, until those conditions are accepted, there is no final agreement such as the court will enforce (*j*). Thus, if a formal contract is sent for signature together with an acceptance of the offer, and the formal contract contains terms which were not referred to in the offer, the result is that there is no such acceptance of the offer as to form a complete contract (*k*).

The fact that a letter accepting the terms of an offer contains a statement that the agreement is to be put into due form by a solicitor, or that a solicitor has been instructed to prepare the necessary documents, does not prevent its constituting an acceptance of the offer; but a letter may be so worded as to show that it was the intention of the writer that there should be no contract until a formal agreement was entered into (*l*).

When once there is a definite acceptance of the terms of the offer, further negotiations between the parties cannot, without the consent of both, get rid of the contract that has been made (*m*); but two letters which may at first sight appear to be on the

(*f*) *Thompson* v. *Gardiner* (1876), 1 C. P. D. 777; *Kempson* v. *Boyle* (1865), 3 H. & C. 763; and see *Sievewright* v. *Archibald* (1851), 17 Q. B. 103.

(*g*) *Thornton* v. *Kempster* (1814), 5 Taunt. 786. In that case one note described the goods as "Riga Rhine hemp" and the other as "Petersburgh clean hemp," these being different qualities. See also *Sievewright* v. *Archibald* (1851), 17 Q. B. 103; *Greyson* v. *Ruck* (1843), 4 Q. B. 737; *Cowie* v. *Remfry* (1846), 5 Moo. P. C. C. 232; *Grant* v. *Fletcher* (1826), 5 B. & C. 436; and other cases under title SALE OF GOODS.

(*h*) *McCaul* v. *Strauss & Co.* (1883), Cab. & El. 106.

(*i*) *Gibbins* v. *North Eastern Metropolitan Asylum District* (1847), 11 Beav. 1; *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124.

(*j*) *Crossley* v. *Maycock* (1874), L. R. 18 Eq. 180.

(*k*) *Jones* v. *Daniel*, [1894] 2 Ch. 332.

(*l*) *Bolton Partners* v. *Lambert* (1889), 41 Ch. D. 295, C. A.; *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124, *per* Lord HATHERLEY, at p. 1143; *Governor etc. of the Poor of Kingston-upon-Hull* v. *Petch* (1854), 10 Exch. 610; *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727, C. A.; and see title SALE OF LAND.

(*m*) *Bellamy* v. *Debenham* (1890), 45 Ch. D. 481.

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one hand an offer and on the other an acceptance will not constitute a contract if it appears from subsequent negotiations that important terms forming part of the contract have been omitted from those letters (*n*).

Who may accept.

723. An offer cannot be accepted by anyone except the person to whom it is made (*o*).

Rejection of offer.

724. Where an offer has been rejected, it is no longer open for acceptance, and though it is not expressly withdrawn, the person to whom it was made cannot afterwards accept it without the consent of the person by whom it was made (*p*).

Counter-offer.

A counter-offer is equivalent to a rejection of the original offer, and after the counter-offer has been refused the original offer is no longer open for acceptance (*q*).

Withdrawal of acceptance.

725. The acceptance of an offer may, at any rate in the case of contracts which are not made through the post, be withdrawn at any time before it has been communicated to the person by whom the offer was made in cases where a notification of acceptance has not been expressly or impliedly dispensed with by the person making the offer (*r*).

SUB-SECT. 3.—*Contracts made through the Post.*

Acceptance by post.

726. In the case of contracts made through the post or by telegram certain special rules are applicable to the offer and the acceptance. An offer made by letter may be accepted by letter, unless some other mode of acceptance is stipulated for by the person making the offer (*s*). Even in the case of an offer which is not made by post, if the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind the post might be used as a means of communicating the acceptance, the offer may be accepted by a letter sent through the post (*t*).

(*n*) *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311; *Bristol, Cardiff, and Swansea Aërated Bread Co.* v. *Maggs* (1890), 44 Ch. D. 616.

(*o*) Thus, where an order for goods was sent to a firm, and the goods were supplied by the plaintiffs, who had acquired the business of that firm, it was held that the plaintiffs could not maintain an action for goods sold (*Boulton* v. *Jones* (1857), 2 H. & N. 564); see also *Meynell* v. *Surtees* (1854), 3 Sm. & G. 101, *per* STUART, V.-C., at p. 117 (affirmed on appeal (1855), 1 Jur. (N. S.) 737); *Schmaling* v. *Thomlinson* (1815), 6 Taunt. 147; *Smith* v. *Wheatcroft* (1878), 9 Ch. D. 223.

(*p*) *Sheffield Canal Co.* v. *Sheffield and Rotherham Rail. Co.* (1841), 3 Ry. & Can. Cas. 121, *per* Lord LANGDALE, M.R., at p. 132; *Thornbury* v. *Bevill* (1842), 1 Y. & C. Ch. Cas. 554. As to what amounts to a sufficient refusal of an offer for this purpose, see *Stevenson* v. *McLean* (1880), 5 Q. B. D. 346. Merely requesting a modification of the offer is not enough (*ibid.*).

(*q*) *Hyde* v. *Wrench* (1840), 3 Beav. 334. As to the time during which an offer remains open for acceptance, see p. 347, *ante*.

(*r*) *Re National Savings Bank Association, Hebb's Case* (1867), L. R. 4 Eq. 9. As to contracts made through the post, see *infra*.

(*s*) *Household Fire Insurance Co.* v. *Grant* (1879), 4 Ex. D. 216, C. A.; *Dunlop* v. *Higgins* (1848), 1 H. L. Cas. 381.

(*t*) *Henthorn* v. *Fraser*, [1892] 2 Ch. 27, C. A., *per* Lord HERSCHELL, at p. 33; *Bruner* v. *Moore*, [1904] 1 Ch. 305.

Time for acceptance.

727. The time within which an offer made by post may be accepted depends, where no time is mentioned in the offer, upon the nature and circumstances of the offer (*u*). In mercantile transactions an offer must as a rule be accepted by return of post, or at any rate by a letter posted on the day on which the offer was received (*a*). Where an offer is made by telegram the presumption is that a prompt reply is expected, and if the acceptance is sent by letter this may be evidence of such unreasonable delay as to make the acceptance inoperative (*b*). A statement that it is desirable for certain reasons that the offer should be accepted by return is a mere request, and does not render it essential that the acceptance should be sent by return of post (*c*).

An intimation that acceptance must be made "by return of post" does not mean exclusively a reply by letter by return of post. The offer may be accepted by telegram or by verbal message or by any means of communication made not later than the time at which a letter sent by return of post would reach the person making the offer (*d*).

Delay and loss in post.

728. The acceptance of an offer made through the post is complete as soon as a properly addressed letter containing the acceptance is posted (*e*). The acceptor is not responsible for any delay or failure on the part of the post office, provided that it is not caused by any default on his part, and the person making the offer is bound by the acceptance from the time when it was posted, notwithstanding that the letter of acceptance is lost in the post (*f*), or that its delivery is delayed (*g*), or that it is returned to the acceptor owing to a mistake in the address caused by the person who made the offer (*h*). The principle is that for the purpose of receiving the acceptance the post office is the agent of the person who makes the offer, not of the acceptor (*i*).

Delivery to postman.

729. Delivery of a letter to a postman outside the course of his ordinary duties is not a posting of the letter, nor will such a letter be assumed to be in the lawful custody of the post office as soon as the postman enters the post office (*j*).

(*u*) Thus, if an allotment of shares is not made within a reasonable time after the receipt of an application for them, the allottee is not bound to accept them (*Ramsgate Victoria Hotel Co.* v. *Montefiore* (1866), L. R. 1 Exch. 109; *Payne* v. *Ives* (1823), 3 Dow. & Ry. (K. B.) 664); see also *Meynell* v. *Surtees* (1855), 25 L. J. (CH.) 257; *Powers* v. *Fowler* (1855), 4 E. & B. 519, n., Ex. Ch.

(*a*) *Dunlop* v. *Higgins* (1848), 1 H. L. Cas. 381.

(*b*) *Quenerduaine* v. *Cole* (1883), 32 W. R. 185.

(*c*) *Johnson* v. *King* (1824), 2 Bing. 270.

(*d*) *Tinn* v. *Hoffmann & Co.* (1873), 29 L. T. 271, *per* HONYMAN, J.

(*e*) *Dunlop* v. *Higgins*, *supra*; *Household Fire Insurance Co.* v. *Grant* (1879), 4 Ex. D. 216, C. A.; *Henthorn* v. *Fraser*, [1892] 2 Ch. 27, C. A.; *Re Imperial Land Co. of Marseilles*, *Harris' Case* (1872), 7 Ch. App. 587.

(*f*) *Duncan* v. *Topham* (1849), 8 C. B. 225; *Household Fire Insurance Co.* v. *Grant*, *supra*. The same principle probably applies in the case of an acceptance by telegram when that mode of acceptance has been expressly or impliedly authorised by the person making the offer; see *Henkel* v. *Pape* (1871), L. R. 6 Exch. 7.

(*g*) *Dunlop* v. *Higgins*, *supra*.

(*h*) *Adams* v. *Lindsell* (1818), 1 B. & Ald. 681; *Re Imperial Land Co. of Marseilles*, *supra*; *Townsend's Case* (1871), L. R. 13 Eq. 148.

(*i*) See *Newcomb* v. *De Ros* (1859), 2 E. & E. 271.

(*j*) *Re London and Northern Bank*, *Ex parte Jones*, [1900] 1 Ch. 220.

SECT. 1. Offer and Acceptance.

Revocation.

730. An offer made by post may be revoked at any time before acceptance, provided that the revocation is communicated to the person to whom the offer was made. The mere posting of a letter containing a revocation of the offer is not sufficient if it is not received before the letter of acceptance is posted (*k*).

The question whether a letter of acceptance can be anticipated by telegram, or by any other means of communication, and revoked before it reaches the person who made the offer, has never been expressly decided by the English courts. On principle it is submitted that a letter of acceptance which has been anticipated in this manner is not binding upon the person by whom it was sent (*l*).

Telegrams.

731. Contracts made by telegram are in much the same position as those made by post (*m*), but neither of the parties is bound by any error in the transmission of his telegram, the post office being an agent only for the purpose of transmitting messages in the terms in which they are received (*n*). An offer by reply-paid telegram does not necessarily preclude an acceptance otherwise than by telegram. It is, unless otherwise expressed, only a request for a prompt reply (*o*).

SECT. 2.—*Consent.*

SUB-SECT. 1.—*In General.*

Mutual assent.

732. It follows from what has been stated above under the heading of offer and acceptance that it is an essential of a valid contract that the parties should assent to the same thing in the same sense—they must have the same intention, and this intention must be declared. If there is no evidence as to the intention of the parties there can be no contract, and similarly, if it appears that they were negotiating or contracting with regard to different things or in contemplation of diverse terms, there is an absence of the essential mutuality and consequently no contract (*p*). Where the parties contract with reference to a subject-matter which, unknown to both of them, has ceased to exist, there is no contract (*q*).

Mistake as to person.

Where an offer made by one person is accepted in the belief that it was made by another, or, conversely, an offer intended to be made to one person is accepted by another, there is no contract if the identity of the person with whom the agreement was intended to be made was an inducement to the other to enter into the

(*k*) *Byrne & Co.* v. *Van Tienhoven* (1880), 5 C. P. D. 344; *Henthorn* v. *Fraser*, [1892] 2 Ch. 27, C. A.; *Raeburn and Verel* v. *Burness and Sons* (1895), 1 Com. Cas. 22.

(*l*) See the *dictum* of BRAMWELL, L.J., in *Household Fire Insurance Co.* v. *Grant* (1879), 4 Ex. D. 216, C. A., at p. 235. In a Scotch case it has been decided that where a letter of acceptance and a subsequent letter revoking the acceptance were delivered simultaneously by the post office to the person who made the offer there was no concluded contract (*Dunmore (Countess)* v. *Alexander* (1830), 9 Sh. (Ct. of Sess.) 190).

(*m*) See *Stevenson* v. *McLean* (1880), 5 Q. B. D. 346.

(*n*) *Henkel* v. *Pape* (1870), L. R. 6 Exch. 7.

(*o*) *Per* HAWKINS, J., in *Read* v. *Anderson* (1882), 10 Q. B. D. 100.

(*p*) *Falck* v. *Williams*, [1900] A. C. 176, P. C. (ambiguous words in telegram understood in different senses); *Raffles* v. *Wichelhaus* (1864), 2 H. & C. 906 (two ships of same name).

(*q*) *Couturier* v. *Hastie* (1856), 5 H. L. Cas. 673.

agreement (*r*); but if the agreement is of such a nature that the identity of the person is immaterial, and it might, without prejudice to the other party, equally well have been made with anybody, the want of mutuality does not in the absence of fraud affect the validity of the transaction (*s*).

Mistake as to nature of contract.

733. The mere signing of a contract does not necessarily imply consent. Thus, if a blind man, or a man who cannot read, or one who for some reason (not involving negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, or if the contents of the document are otherwise misrepresented to the person signing, then, at any rate if there is no negligence, the signature so obtained is of no force (*t*). The principle applies to negotiable instruments, and a person who signs in the belief that he is signing a document of a different kind is not liable even to a holder in due course (*u*).

This principle is subject to the limitation that if a man executes a deed knowing that it is one purporting to deal with his property, he cannot set up a misrepresentation as to the contents of the deed so as to support a plea of *non est factum* (*v*).

Negligence.

A person will not in any case be permitted to deny his assent to a

(*r*) *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459; *Re Reed, Ex parte Barnett* (1876), 3 Ch. D. 123; *Hardman* v. *Booth* (1863), 1 H. & C. 803; *Smith* v. *Wheatcroft* (1878), 9 Ch. D. 223. Contracts made on behalf of undisclosed principals are an exception to the rule; but where a contract is made by an agent in his own name, the other contracting party is entitled to look for performance to either the agent or the principal, so that he is not prejudiced.

(*s*) See cases cited in the preceding note. *Gordon* v. *Street*, [1899] 2 Q. B. 641, C. A., was decided on the ground of fraud.

(*t*) The signature can be repudiated not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the writer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended (*Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704, *per* the court (BOVILL, C.J., BYLES, KEATING, and MONTAGUE SMITH, JJ.), at p. 711; see also *Thoroughgood's Case* (1582), 2 Co. Rep. 9; *Lewis* v. *Clay* (1897), 67 L. J. (Q. B.) 224). It is doubtful whether, if there is a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed really were, may not, by executing it negligently, be estopped as between himself and a person who innocently acts upon the faith of the deed being valid, and who accepts an estate under it; see *per* MELLISH, L.J., in *Hunter* v. *Walters* (1871), 7 Ch. App. 75, at p. 87; *Howatson* v. *Webb*, [1908] 1 Ch. 1, C. A. As to whether a deed may be partly good and partly bad, see *Pigot's Case* (1614), 11 Co. Rep. 26 b, and *Howatson* v. *Webb*, *supra*; see also title MISREPRESENTATION AND FRAUD.

(*u*) *Lewis* v. *Clay* (1897), 67 L. J. (Q. B.) 224; *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704.

(*v*) *Howatson* v. *Webb*, *supra*; *National Provincial Bank of England* v. *Jackson* (1886), 33 Ch. D. 1, C. A.; *Lloyds Bank, Ltd.* v. *Bullock*, [1896] 2 Ch. 192. *Quære* whether the plea of *non est factum* is not confined to cases where the party is blind or illiterate (*Howatson* v. *Webb*, *supra*). See also *Bagot* v. *Chapman*, [1907] 2 Ch. 222, where it was held, distinguishing *Howatson* v. *Webb*, *supra*, that where a husband misrepresents to his wife the nature of a joint deed, the wife's plea of *non est factum* is good.

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contract where he has been guilty of negligence and has thereby misled the other party, and induced him to believe that he assented (*w*).

Voidable contracts.

734. A contract, although mutually assented to, may be voidable by one of the parties on the ground that his consent was obtained by duress (*a*), undue influence (*b*), or fraud, or in certain classes of cases by misrepresentation not amounting to fraud, and although the contract is not void or voidable, relief of various kinds, according to the circumstances, may be given on the ground of mistake or innocent misrepresentation. The subjects of mistake, misrepresentation, and fraud are treated of elsewhere (*c*).

SUB-SECT. 2.—*Duress.*

Meaning of duress.

735. By duress is meant the compulsion under which a person acts through fear of personal suffering, as from injury to the body or from confinement, actual or threatened (*d*). A threat of a criminal prosecution for which there is sufficient ground is not such duress as will vitiate a contract made in consequence thereof, provided that there is adequate valuable consideration for the contract, and that there is no agreement to stifle the prosecution (*e*). Nor, as a general rule, does a threat of civil proceedings or bankruptcy proceedings amount to duress, whether there is good foundation for the proceedings or not, though it may do so if it is intended and calculated, having regard to the circumstances, to cause terror in the particular case (*f*). The question whether

(*w*) *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266; *Tamplin* v. *James* (1880), 15 Ch. D. 215, C. A.; *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 704; *Lewis* v. *Clay* (1897), 67 L. J. (Q. B.) 224; and see title ESTOPPEL.

(*a*) See the text.

(*b*) See p. 357, *post*.

(*c*) See titles MISREPRESENTATION AND FRAUD; MISTAKE. In certain classes of contracts *uberrima fides* and full disclosure are required. The principle is applied to the greatest extent in contracts of insurance (see title INSURANCE) and partnership (see title PARTNERSHIP), and contracts between persons between whom a fiduciary relationship exists, such as principal and agent, solicitor and client, trustee and beneficiary, etc. (see titles AGENCY, Vol. I., p. 145; SOLICITORS; TRUSTS AND TRUSTEES), and to a more limited extent in contracts of suretyship (see title GUARANTEE) and family arrangements (see title FAMILY ARRANGEMENTS). The effect of non-disclosure where there is a duty to disclose is to render the contract voidable at the option of the party to whom the duty was owing.

(*d*) For an example of duress from fear of confinement, see *Cumming* v. *Ince* (1847), 11 Q. B. 112, where a woman had been forcibly taken to a private lunatic asylum and a commission of lunacy was sued out against her and an inquisition held, at which, before any verdict was taken, an arrangement was entered into, signed by her counsel, under which she gave up certain deeds. It was held that the arrangement, having been entered into by her under fear of personal suffering brought upon her by confinement in a lunatic asylum, was obtained by duress and was not binding on her. *Aliter* she was incompetent to contract and could not appoint anyone to contract for her. See, however, *Biffin* v. *Bignell* (1862), 7 H. & N. 877, as to the distinction between a threat and a mere warning. Where money is obtained from a person as a condition of his release from arrest, a fraudulent use having been made of legal process, it can be recovered (*Cadaval* (*Duke*) v. *Collins* (1836), 4 Ad. & El. 858; see also *Nicholls* v. *Nicholls* (1737), 1 Atk. 409; *Roy* v. *Beaufort* (*Duke*) (1741), 2 Atk. 190).

(*e*) *Flower* v. *Sadler* (1882), 10 Q. B. D. 572, C. A. (bills of exchange accepted under threat of prosecution for embezzlement). Compare *R.* v. *Southerton* (1805), 6 East, 126; *Williams* v. *Bayley* (1866), L. R. 1 H. L. 200.

(*f*) *Scott* v. *Sebright* (1887), 12 P. D. 21.

imprisonment or threatened imprisonment does or does not constitute duress depends upon whether the imprisonment is lawful or unlawful (*g*).

Effect of.

A contract obtained by means of duress exercised by one party over the other (*h*) is voidable and not void (*i*), and if voluntarily acted upon by the party entitled to avoid, it will become binding on him (*k*). The duress must be actually existing at the time of the making of the contract (*l*), and the personal suffering may be that of the husband or wife (*m*) or near relative (*a*) of the contracting party, but that of a stranger (*b*) or a master (*m*) is not sufficient.

Duress of property.

Duress of goods, or the compulsion under which a man acts through fear for his property, is not a good ground for avoiding a contract (*c*) ; the possible hardship thereby involved is, however, mitigated by the principle that if goods are wrongfully detained and money is paid to obtain them, the money, being paid under a species of duress or constraint, may be recovered back (*d*).

SUB-SECT. 3.—*Undue Influence.*

Undue influence.

736. A contract may be avoided or set aside at the instance of one of the parties to it on the ground that his consent thereto was obtained by undue influence.

Undue influence may be defined, for this purpose, as the unconscientious use by one person of power possessed by him over another in order to induce the other to enter into a contract (*e*).

Equitable relief.

Courts of equity have always granted relief in the case not only of contracts, but of transactions, of whatever nature, which are shown to be of an unconscionable character, that is to say, wherever an unfair advantage has been taken of a person who was,

(*g*) *Smith* v. *Monteith* (1844), 13 M. & W. 427 ; *Brinkley* v. *Hann* (1843), Drury *temp.* Sug. 175 ; and cases cited note (*d*), p. 356, *ante*.

(*h*) See *Brinkley* v. *Hann* (1843), Drury *temp.* Sug. 175 (but see *Wilkinson* v. *Stafford* (1789), 1 Ves. 31, at p. 43) ; *Hinton* v. *Hinton* (1755), 2 Ves. Sen. 631.

(*i*) *Whelpdale's Case* (1604), 5 Co. Rep. 119; 2 Co. Inst. 483. The principle extends to contracts of marriage (see *Ford* v. *Stier*, [1896] P. 1 ; *Scott* v. *Sebright* (1887), 12 P. D. 21 ; *Cooper* v. *Crane*, [1891] P. 369 ; and title HUSBAND AND WIFE).

(*k*) *Ormes* v. *Beadel* (1860), 2 De G. F. & J. 333.

(*l*) *Anon.* (1707-9), 3 P. Wms. 294, n.

(*m*) See 1 Roll. Abr. 687 ; compare *McClatchie* v. *Haslam* (1891), 17 Cox, C. C. 402, C. A.

(*a*) See 1 Roll. Abr. 687 ; *Williams* v. *Bayley* (1866), L. R. 1 H. L. 200 ; *Seear* v. *Cohen* (1882), 45 L. T. 582.

(*b*) See 1 Roll. Abr. 687. Thus it is not a good defence to an action on a bond that it was given to secure the release of a third person imprisoned by the plaintiff without reasonable cause and against the law (*Huscombe* v. *Standing* (1607), Cro. Jac. 187 ; *Butcher* v. *Steuart* (1843), 11 M. & W. 857) ; but *quære* when the arrest is illegal whether there is any consideration for the agreement (see *Smith* v. *Monteith* (1844), 13 M. & W. 427 ; *Pole* v. *Harrobin* (1782), 9 East, 416, n.).

(*c*) *Skeate* v. *Beale* (1840), 11 Ad. & El. 983, *per* Lord DENMAN, C.J., at p. 990 ; *Atlee* v. *Backhouse* (1838), 3 M. & W. 633, *per* PARKE, B., at p. 650 ; Shep. Touch. p. 61. Thus fear of the expense of a bankruptcy commission is not duress (*Powell* v. *Hoyland* (1851), 6 Exch. 67). The older authorities were not uniform on this point (see 1 Roll. Abr. 687, and *Astley* v. *Reynolds* (1751), 2 Stra. 915 ; see also Bacon's Maxims, Regula, 18).

(*d*) See pp. 468, 478, *post*.

(*e*) Compare *Aylesford* (*Earl*) v. *Morris* (1873), 8 Ch. App. 484, *per* Lord SELBORNE, L.C., at p. 490 ; *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, C. A., *per* LINDLEY, L.J., at p. 183.

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from whatever cause, in the power of another or subject to his influence. The grant of relief on this ground has most commonly been made in the case of unfair dealings with expectant heirs or persons in pecuniary distress, but the power to grant relief is not limited to such cases, and may be exercised in any case in which an unfair use has been made of influence possessed by one person over another (*f*). The principles upon which courts of equity act in the exercise of this jurisdiction are dealt with elsewhere (*g*), and it only remains to state here in general terms the circumstances in which one party to a contract is regarded as being under the influence of the other, and the effect of an undue exercise of that influence upon the rights of the parties under the contract.

Influence arising from particular relationship.

737. The influence which is here referred to arises most commonly from the existence of a particular relationship between the parties, but the right to avoid a contract on the ground of undue influence may be exercised in any case where such influence in fact exists and has been abused, even if the parties do not stand in any particular relationship to one another (*h*).

The relationship between the parties may be of a parental or *quasi*-parental (*i*), spiritual (*k*), or confidential character (*l*). The most common examples of a confidential relationship are those of solicitor and client (*m*), trustee and *cestui que trust* (*n*), guardian and ward (*o*), physician and patient (*p*), principal and

(*f*) *Tate* v. *Williamson* (1866), 2 Ch. App. 55.

(*g*) As to relief in the case of unconscionable bargains, see titles FRAUDULENT AND VOIDABLE CONVEYANCES; MONEY AND MONEY LENDING; and as to undue influence in the case of gifts and settlements, see titles GIFTS; SETTLEMENTS.

(*h*) *Smith* v. *Kay* (1859), 7 H. L. Cas. 750, *per* Lord CRANWORTH, at p. 770, and *per* Lord KINGSDOWN, at p. 779.

(*i*) See *Cocking* v. *Pratt* (1750), 1 Ves. Sen. 400; *Archer* v. *Hudson* (1844), 7 Beav. 551 (uncle and niece); *Wright* v. *Vanderplank* (1855), 2 K. & J. 1 (father and daughter); *Berry* v. *Glazebrook* (1891), 7 T. L. R. 574, C. A.; *Bainbrigge* v. *Browne* (1881), 18 Ch. D. 188; *Harvey* v. *Mount* (1845), 8 Beav. 439 (elder and younger sister); *Thornber* v. *Sheard* (1850), 12 Beav. 589; *Carpenter* v. *Heriot* (1759), 1 Eden, 338; *Davies* v. *Davies* (1863), 4 Giff. 417 (father and daughter); *Chambers* v. *Crabbe* (1865), 34 Beav. 457; *M'Mackin* v. *Hibernian Bank*, [1905] 1 I. R. 296 (mother and daughter); *Savery* v. *King* (1856), 5 H. L. Cas. 627 (father and son); *Bury* v. *Oppenheim* (1859), 26 Beav. 594 (father and daughter); *Sharp* v. *Leach* (1862), 31 Beav. 491 (brother and sister). Reasonable family arrangements will not be set aside on the ground of the exercise of parental authority, except where such authority appears to have been unduly exercised in order to acquire a personal benefit (see *Hoblyn* v. *Hoblyn* (1889), 41 Ch. D. 200; *Hartopp* v. *Hartopp* (1856), 21 Beav. 259; *Cory* v. *Cory* (1747), 1 Ves. Sen. 19; *Tendril* v. *Smith* (1740), 2 Atk. 85). See title FAMILY ARRANGEMENTS.

(*k*) See *Huguenin* v. *Baseley* (1807), 14 Ves. 273; *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, C. A.; *Morley* v. *Loughnan*, [1893] 1 Ch. 736; *Norton* v. *Relly* (1764), 2 Eden, 286; *Nottidge* v. *Prince* (1860), 2 Giff. 246; *Lyon* v. *Home* (1868), L. R. 6 Eq. 655.

(*l*) See *Cobbett* v. *Brock* (1855), 20 Beav. 524 (persons engaged to be married); *Lovesy* v. *Smith* (1880), 15 Ch. D. 655; *O'Connor* v. *Foley*, [1905] 1 I. R. 1.

(*m*) See *Wright* v. *Carter*, [1903] 1 Ch. 27, C. A.; and title SOLICITORS.

(*n*) See title TRUSTS AND TRUSTEES.

(*o*) See *Hylton* v. *Hylton* (1754), 2 Ves. Sen. 547; *Taylor* v. *Johnston* (1882), 19 Ch. D. 603; *Powell* v. *Powell*, [1900] 1 Ch. 243; *Hatch* v. *Hatch* (1804), 9 Ves. 292; *Wood* v. *Downes* (1811), 18 Ves. 120; *Wright* v. *Proud* (1806), 13 Ves. 136; *Hamilton* v. *Mohun* (1710), 1 P. Wms. 118.

(*p*) See *Dent* v. *Bennett* (1835), 7 Sim. 539; *Ahearne* v. *Hogan* (1844), Drury *temp.* Sug. 310; *Billage* v. *Southee* (1852), 9 Hare, 534; *Mitchell* v. *Homfray* (1881), 8 Q. B. D. 587, C. A.; *Radcliffe* v. *Price* (1902), 18 T. L. R. 466.

agent (*q*), husband and wife (*r*), but it is not necessary that the relationship should be of a strictly fiduciary character (*s*).

Burden of proof.

The existence of any such relationship between the parties to a contract raises a presumption that undue influence has been exercised, and where the transaction is impeached the burden rests on the party possessing the influence to prove that the other party not only had full knowledge of the facts at the time when the contract was made, but that he acted under competent independent advice (*t*).

Where no such relationship exists between the parties, the burden of proving the exercise of undue influence rests upon the party who seeks to avoid the contract on this ground (*u*).

Influence of third person.

738. A contract may be avoided on the ground of undue influence exercised by a third person, provided that the other party was aware at the time when the contract was made that such undue influence had been exercised (*v*).

Legal effect of undue influence.

739. The legal effect of undue influence is to render the contract voidable at the instance of the party over whom the influence has been exerted (*a*); but the right to avoid a contract on this ground can only be exercised subject to the same limitations as are applicable in the case of other voidable contracts. If the party who has been subjected to undue influence subsequently elects to affirm the transaction, the right to repudiate it can no longer be exercised (*b*); but there can be no affirmation in such a case unless

(*q*) See title AGENCY, Vol. I., p. 145. As to directors of a company contracting with the company, see *Gluckstein* v. *Barnes*, [1900] A. C. 240; *Imperial Mercantile Credit Association* (*Liquidators*) v. *Coleman* (1873), L. R. 6 H. L. 189; *Flanagan* v. *Great Western Rail. Co.* (1868), 19 L. T. 345; and title COMPANIES, Vol. V.

(*r*) *Barron* v. *Willis*, [1900] 2 Ch. 121, C. A.; *Bischoff's Trustee* v. *Frank* (1903), 89 L. T. 188; *Chaplin & Co., Ltd.* v. *Brammall*, [1908] 1 K. B. 233, C. A.; *Howes* v. *Bishop* (1908), 25 T. L. R. 171. No presumption of undue influence arises from the relationship of husband and wife where the wife is dealing with her separate property (*Grigby* v. *Cox* (1750), 1 Ves. Sen. 517; *Nedby* v. *Nedby* (1852), 5 De G. & Sm. 377; *Bank of Africa* v. *Cohen* (1909), 25 T. L. R. 285). See also title HUSBAND AND WIFE.

(*s*) See *Harvey* v. *Mount* (1845), 8 Beav. 439; *Page* v. *Horne* (1848), 11 Beav. 227; *Beanland* v. *Bradley* (1854), 2 Sm. & G. 339; *Coulson* v. *Allison* (1860), 2 De G. F. & J. 521; *Sharp* v. *Leach* (1862), 31 Beav. 491; *Sercombe* v. *Sanders* (1865), 34 Beav. 382; *Tate* v. *Williamson* (1866), 2 Ch. App. 55; *Wright* v. *Long* (1898), 14 T. L. R. 434; *Cavendish* v. *Strutt* (1903), 19 T. L. R. 483; *Chaplin & Co., Ltd.* v. *Brammall*, *supra*.

(*t*) *Smith* v. *Kay* (1859), 7 H. L. Cas. 750; *Kempson* v. *Ashbee* (1874), 10 Ch. App. 15; *Sharp* v. *Leach*, *supra*; *Morley* v. *Loughnan*, [1893] 1 Ch. 736; *Molony* v. *Kernan* (1842), 2 Dr. & War. 31; *Charter* v. *Trevelyan* (1842), 11 Cl. & Fin. 714, H. L.; *Savery* v. *King* (1856), 5 H. L. Cas. 627; *Ward* v. *Sharp* (1884), 53 L. J. (CH.) 313; *Collins* v. *Hare* (1828), 2 Bli. (N. S.) 106, H. L.; *Waters* v. *Shaftesbury* (*Earl*) (1866), 14 L. T. 184; *Imperial Mercantile Credit Association* (*Liquidators*) v. *Coleman* (1873), L. R. 6 H. L. 189; *Gluckstein* v. *Barnes*, [1900] A. C. 240; *Powell* v. *Powell*, [1900] 1 Ch. 243; *Barron* v. *Willis*, [1900] 2 Ch. 121, C. A.

(*u*) *Blackie* v. *Clark* (1852), 15 Beav. 595.

(*v*) *Cobbett* v. *Brock* (1855), 20 Beav. 524; *Thornber* v. *Sheard* (1850), 12 Beav. 589; *Bunbury* v. *Hibernian Bank*, [1908] 1 I. R. 261; *Chaplin & Co., Ld.* v. *Brammall*, *supra*; and see *Blackie* v. *Clark* (1852), 15 Beav. 595, and *Smith* v. *Kay* (1859), 7 H. L. Cas. 750.

(*a*) *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, C. A.

(*b*) *Mitchell* v. *Homfray* (1881), 8 Q. B. D. 587, C. A.; *Allcard* v. *Skinner*, *supra*;

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it is made with full knowledge of the facts and of the party's rights after he has been released from the influence of the other (*c*). The right to repudiate is not lost by mere delay in exercising it, so long as the relationship from which the influence arises continues to exist between the parties (*d*).

SECT. 3.—*Form of the Contract.*

Form.

740. Speaking generally, a contract may be validly made either verbally or in writing, and if it is in writing, either under hand only or under seal; but certain contracts must be in writing, and of these some must be in the form of a deed, *i.e.*, under seal (*e*).

Written contracts.

741. Contracts in writing under hand only do not form a distinct class. In their general incidents they do not differ from verbal contracts, and in cases where writing is made a statutory requirement it is usually only as a matter of evidence, and not of the substance of the contract (*f*). The term "parol" is sometimes applied to simple contracts, whether written or oral, as distinguished from contracts by deed, and sometimes to oral as distinguished from written contracts. It is more properly used in the former sense.

SUB-SECT. 1.—*Contracts that must be made by Deed.*

Contracts required to be by deed.

742. The following contracts, in order to be enforceable, must be made by deed:—(i.) Contracts made without valuable consideration (*g*); (ii.) contracts of corporations (*h*); (iii.) leases for more than three years, or reserving a rent less than two-thirds of the full improved value (*i*); (iv.) assignments and surrenders of leases (*i*); (v.) assignments of sculpture (*j*). In addition to these, transfers of shares in companies must, in the absence of provision to the contrary in the articles of association, be made by deed (*k*), and the statutory form for the transfer of a British ship or of a share therein is in the form of a deed (*l*).

Wright v. *Vanderplank* (1856), 8 De G. M. & G. 133; *Wentworth* v. *Lloyd* (1864), 10 H. L. Cas. 589. See also *Howes* v. *Bishop* (1908), 25 T. L. R. 171.

(*c*) *Moxon* v. *Payne* (1873), 8 Ch. App. 881; *Bainbrigge* v. *Brown* (1881), 18 Ch. D. 188, 196.

(*d*) *Kempson* v. *Ashbee* (1874), 10 Ch. App. 15; *Allcard* v. *Skinner*, *supra*; *Fry* v. *Lane* (1888), 40 Ch. D. 312, at p. 324. Compare *Wentworth* v. *Lloyd* (1864), 10 H. L. Cas. 589.

(*e*) As to the execution and nature of a deed, see title DEEDS AND OTHER INSTRUMENTS.

(*f*) *Rann* v. *Hughes* (1778), 2 Term Rep. 350, n., H. L.

(*g*) As to the nature of valuable consideration, see p. 383, *post*.

(*h*) But there are many exceptions; see, generally, titles COMPANIES, Vol. V.; CORPORATIONS; LOCAL GOVERNMENT; PUBLIC HEALTH ETC.

(*i*) Statute of Frauds (29 Car. 2, c. 3), ss. 2, 3; Real Property Amendment Act, 1845 (8 & 9 Vict. c. 106), s. 3; and see title LANDLORD AND TENANT.

(*j*) Sculpture Copyright Act, 1814 (54 Geo. 3, c. 56), s. 4. The statute does not in terms require a deed, but the inference is that the contract should be so made; see title COPYRIGHT AND LITERARY PROPERTY.

(*k*) The transfer must always be by deed in the case of a company registered under the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 14, 16. See title COMPANIES, Vol. V.

(*l*) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). See title SHIPPING AND NAVIGATION.

SUB-SECT. 2.—*Contracts required to be in Writing.*

(1) *What Contracts must be in Writing.*

SECT. 3. Form of the Contract.

Contracts required to be in writing.

743. The following contracts, in order to be enforceable, must be evidenced by some memorandum or note thereof in writing, signed by the party to be charged or by some person lawfully authorised by him to sign (*m*):—(i.) A contract by an executor or administrator whereby he incurs a personal liability to discharge a debt or obligation of the testator or intestate (*n*); (ii.) a contract to become liable for the debt, default, or miscarriage of another person (*o*); (iii.) a contract made upon consideration of marriage (*p*); (iv.) a contract relating to lands, tenements, or hereditaments, or any interest in or concerning them (*q*); (v.) a contract which is not to be performed within one year from the making thereof (*r*).

Statute of Frauds.

Sale of goods.

744. A contract for the sale of any goods of the value of £10 or upwards (even though such goods may be intended to be delivered at some future time, or at the date of the contract may not be made or ready for delivery) is not enforceable, unless either (a) the buyer accepts (*s*) part of the goods sold and actually receives the same, or gives something in earnest to bind the contract or in part payment, or (b) some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent in that behalf (*t*).

(*m*) Statute of Frauds (29 Car. 2, c. 3), s. 4. The person lawfully authorised to sign need not be authorised in writing; the authority may be given verbally, or be implied from the conduct of the parties or the circumstance of the case (*Mortlock* v. *Buller* (1804), 10 Ves. 292, at p. 311; *Heard* v. *Pilley* (1869), 4 Ch. App. 548; *Coles* v. *Trecothick* (1804), 9 Ves. 234; *Graham* v. *Musson* (1839), 5 Bing. (N. C.) 603; *Bowen* v. *D'Orleans* (*Duc*) (1900), 16 T. L. R. 226, C. A.). Nor need he be authorised specifically to sign a memorandum as a record of the contract (*John Griffiths Cycle Corporation* v. *Humber & Co.*, [1899] 2 Q. B. 414, C. A. This case was reversed in the House of Lords, but upon another point; see [1902] W. N. 9). *Semble*, that the statute has no application to contracts under seal, which may be enforceable without signature if duly sealed and delivered (see *Cherry* v. *Heming* (1849), 4 Exch. 631; *Aveline* v. *Whisson* (1842), 4 Man. & G. 801; *Cooch* v. *Goodman* (1842), 2 Q. B. 580; *Holmes* v. *Mitchell* (1859), 7 C. B. (N. S.) 361, "a deed is not within the Statute of Frauds," *per* WILLES, J., at p. 368).

(*n*) *Ibid.* See title EXECUTORS AND ADMINISTRATORS.

(*o*) *Ibid.* See p. 362, *post*.

(*p*) *Ibid.* See p. 364, *post*.

(*q*) *Ibid.* See titles LANDLORD AND TENANT; SALE OF LAND.

(*r*) *Ibid.* See p. 365, *post*.

(*s*) "Accepts" here is used in a technical sense, and means the doing of any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4).

(*t*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4. See also title SALE OF GOODS. Other enactments that necessitate a contract in writing in particular instances are: Statute of Frauds (29 Car. 2, c. 3), ss. 1, 2, 3 (the Real Property Amendment Act, 1845 (8 & 9 Vict. c. 106), s. 3, requires these contracts to be by deed; see title LANDLORD AND TENANT); Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), contracts for the transfer of a ship or a share therein, see title SHIPPING AND NAVIGATION; Stamp Act, 1891 (54 & 55 Vict. c. 39), policies of sea insurance, see title INSURANCE; Bills of Sale Acts, 1878 and 1882 (41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43), bills of sale, see title BILLS OF SALE, Vol. III., p. 1; Copyright Acts, assignment of copyright, see title COPYRIGHT; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), bills of exchange and promissory notes, see title BILLS OF EXCHANGE ETC., Vol. II., p. 457.

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Effect of statutory requirements.

745. The effect of the above statutory requirements is not to render void contracts which do not comply therewith, still less to make them illegal, but to make a note or memorandum in writing indispensable evidence in proceedings to enforce them (*u*). Hence, a contract made abroad in a country by the law of which writing is unnecessary will not be enforced in England unless the provisions of the statute are complied with, because, although the formalities required are generally governed by the *lex loci contractus*, the mode of proof is regarded as a matter of procedure, which depends upon the *lex fori* (*v*).

(a) *Promise to answer for the debt etc. of another.*

Words strictly construed.

746. The words "promise to answer for the debt, default or miscarriage of another" have been construed very strictly and narrowly. In the first place, it is well established that the statute has no application where a primary liability is incurred by the promisor, but only applies where he incurs a secondary liability to answer for the debt or default of another for which that other is primarily liable (*a*). Thus, a promise to pay a debt incurred by an infant which is void or voidable by him on the ground of his infancy (*b*), or to fulfil a contract entered into by a corporation which is not enforceable against the corporation because it is not under seal (*c*), is not within the statute and is therefore binding although not evidenced by writing. An agreement to give a guarantee is within the statute (*d*).

Void or voidable debt.

Agreement to give guarantee.

(*u*) *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, *per* Lord BLACKBURN, at p. 488; *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123, C. A.; *Hugill* v. *Masker* (1889), 22 Q. B. D. 364. The statute must be specially pleaded (R. S. C., Ord. 19, rr. 15, 20; *Clarke* v. *Callow* (1876), 46 L. J. (Q. B.) 53, C. A.; *James* v. *Smith*, [1891] 1 Ch. 384). It is not necessary, in order that the statute should apply, that the action should be brought on the agreement; it is sufficient if the effect of the action is to "charge" the defendant by means of the agreement (*Carrington* v. *Roots* (1837), 2 M. & W. 248). Where a contract of sale is not enforceable by reason of the statute, the buyer has no insurable interest in the goods (*Stockdale* v. *Dunlop* (1840), 6 M. & W. 224), nor, where the requirements of the statute have not been complied with, can a buyer bring an action against the carrier for loss of the goods, treating the vendor as his agent to forward (*Coombs* v. *Bristol and Exeter Rail. Co.* (1858), 3 H. & N. 510; see also *Coats* v. *Chaplin* (1842), 3 Q. B. 483); nor can a buyer bring an action against a stranger for conversion of the goods after the making of the actual contract and before the reduction of its terms to writing (*Felthouse* v. *Bindley* (1862), 31 L. J. (C. P.) 204).

(*v*) *Leroux* v. *Brown* (1852), 12 C. B. 801. For a treatment of this subject in detail, see title CONFLICT OF LAWS, Vol. VI., p. 232.

(*a*) *Lakeman* v. *Mountstephen* (1874), L. R. 7 H. L. 17; *Dixon* v. *Hatfield* (1825), 2 Bing. 439; *Hargreaves* v. *Parsons* (1844), 13 M. & W. 561; *Bird* v. *Gammon* (1837), 3 Bing. (N. C.) 883; *Anstey* v. *Marden* (1804), 1 Bos. & P. (N. R.) 124; *Birkmyr* v. *Darnell* (1706), 1 Salk. 27; 1 Smith, L. C., 11th ed., 299; *Thomas* v. *Cook* (1828), 8 B. & C. 728; *Guild & Co.* v. *Conrad*, [1894] 2 Q. B. 885; *Batson* v. *King* (1859), 4 H. & N. 739; *Reader* v. *Kingham* (1862), 13 C. B. (N. S.) 344; *Cripps* v. *Hartnoll* (1863), 32 L. J. (Q. B.) 381; *Wildes* v. *Dudlow* (1874), L. R. 19 Eq. 198; *Keate* v. *Temple* (1797), 1 Bos. & P. 158; *Darnell* v. *Tratt* (1825), 2 C. & P. 82; *Storr* v. *Scott* (1833), 6 C. & P. 241; *Croft* v. *Smallwood* (1793), 1 Esp. 121; and see title GUARANTEE.

(*b*) *Harris* v. *Huntbach* (1757), 1 Burr. 373.

(*c*) *Lakeman* v. *Mountstephen*, *supra*.

(*d*) *Mallett* v. *Bateman* (1865), L. R. 1 C. P. 163.

747. It is also necessary, in order that the promise may be within the scope of the statute, that the person primarily liable should continue to be so liable notwithstanding the promise. The statute does not apply to a promise to pay the debt of another under such circumstances that the original debt is extinguished (*e*), or a promise to assume the liability of another in substitution for his liability and so as to discharge him (*f*). Nor does the statute apply unless the promise is made to the creditor or person to whom the duty is owing; a promise to a debtor to pay his debt is not within the statute (*g*).

Discharge of principal debtor.

Promise to debtor.

748. A promise in the nature of an indemnity is not within the statute, although it may involve the obligation of discharging a debt for which another person is primarily liable (*h*), nor does the statute apply to a promise by one of several persons against whom a claim is made to discharge the claim. The debt or obligation must be exclusively that of another person (*i*). Nor does the statute apply where the promise to answer for the debt or default of another is only an incident of a contract dealing with other matters (*k*), as in the case of an agreement by an agent to sell on a *del credere* commission (*l*), or an agreement by an agent or servant to be answerable in respect of a certain proportion of bad debts incurred by him (*m*). Where, however, the only object of the contract is to secure forbearance in favour of the person primarily liable, a promise to pay his debt is within the statute, whatever may be the ultimate motives of the promisor (*n*).

Indemnity.

Promise by person liable.

Contract dealing with other matters.

749. The statute does not apply where there is some valuable consideration for the promise, other than mere forbearance on the part of the promisee, as, for instance, where debts are assigned to a person in consideration of an agreement by him to pay a certain composition to the creditors (*o*), or the promise is made in consideration of the promisee giving up a lien (*p*) or delivering up goods on

Promise for valuable consideration.

(*e*) *Goodman* v. *Chase* (1818), 1 B. & Ald. 297 (promise to pay on discharge of debtor from execution on a *ca. sa.*); *Butcher* v. *Steuart* (1843), 11 M. & W. 857; *Tomlinson* v. *Gell* (1837), 6 Ad. & El. 564.

(*f*) *Browning* v. *Stallard* (1814), 5 Taunt. 450 (buyer of goods who was unable to pay for them transferred them to another who promised to pay the price); *Taylor* v. *Hilary* (1835), 1 Cr. M. & R. 741 (a case of novation); *Anstey* v. *Marden* (1804), 1 Bos. & P. (N. R.) 124; and see p. 505, *post*.

(*g*) *Eastwood* v. *Kenyon* (1840), 11 Ad. & El. 438.

(*h*) *Re Hoyle, Hoyle* v. *Hoyle*, [1893] 1 Ch. 684, C. A. (undertaking by a partner to indemnify the firm in respect of debts owing by a named person held not within the statute).

(*i*) *Orrell* v. *Coppock* (1856), 26 L. J. (CH.) 269 (claim against trustees and a beneficiary who had bought a portion of the trust property from them for breach of trust; promise by the beneficiary to pay a certain sum in settlement of the claim); *Thomas* v. *Cook* (1828), 8 B. & C. 728 (promise by one co-surety to another to see him harmless); *Guild & Co.* v. *Conrad*, [1894] 2 Q. B. 885, C. A.

(*k*) *Harbury India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 778, C. A.; *Couturier* v. *Hastie* (1852), 8 Exch. 40; *Fleet* v. *Murton* (1871), L. R. 7 Q. B. 126, 132; *Sutton & Co.* v. *Grey*, [1894] 1 Q. B. 285, C. A.

(*l*) *Shaw* v. *Woodcock* (1827), 7 B. & C. 73; *Couturier* v. *Hastie, supra; Wickham* v. *Wickham* (1855), 2 K. & J. 478.

(*m*) *Sutton & Co.* v. *Grey, supra*.

(*n*) *Harbury India Rubber Comb Co.* v. *Martin, supra*.

(*o*) *Anstey* v. *Marden, supra*.

(*p*) *Castling* v. *Aubert* (1802), 2 East, 325; *Fitzgerald* v. *Dressler* (1859), 7 C. B. (N. S.) 374; *Williams* v. *Leper* (1766), 3 Burr. 1886.

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which he has distrained (*q*), or where the promise is to pay a debt out of funds belonging to the debtor in the hands of the promisor (*r*), or to pay or guarantee the payment of debts in consideration of an assignment to the promisor of property belonging to the debtor (*s*).

Though no action can be brought on a parol guarantee, the courts have power to enforce one against a solicitor by virtue of their summary jurisdiction over their own officers (*t*).

Damages for tort.

750. The words "default or miscarriage" extend to a liability to pay damages in respect of a tort (*a*).

(b) *Agreement made upon Consideration of Marriage.*

Marriage contracts.

751. An agreement in consideration of marriage must not be confused with a promise to marry; the matters aimed at by the statute are such agreements as marriage settlements and the like (*b*). Such a contract must be evidenced by writing which complies with the statutory requirements. Two questions that may arise in these cases are—(1) Did what was done amount to an offer which was turned into a contract by the celebration of the marriage? (2) Is the contract in writing so as to satisfy the Statute of Frauds?

It is necessary to distinguish between a mere representation that the writer intends to do something in the future and a definite offer (*c*).

752. The cases cited on the question as to whether or not there is a contract are also, for the most part, authorities on the question as to whether the contract is sufficiently expressed in writing (*d*).

(*q*) *Edwards* v. *Kelly* (1817), 6 M. & S. 204.

(*r*) *Hodgson* v. *Anderson* (1825), 3 B. & C. 842.

(*s*) *Bird* v. *Gammon* (1837), 3 Bing. (N. C.) 883; *Hargreaves* v. *Parsons* (1844), 13 M. & W. 561.

(*t*) *Evans* v. *Duncan* (1831), 1 Tyr. 283; an oral guarantee may be given in evidence to show that the defendant had accepted a bill as an accommodation bill; *Cresswell* v. *Wood* (1839), 10 Ad. & El. 460.

(*a*) *Kirkham* v. *Marter* (1820), 2 B. & Ald. 613.

(*b*) See *Cork* v. *Baker* (1717), 1 Stra. 34.

(*c*) *Re Fickus, Farina* v. *Fickus*, [1900] 1 Ch. 331, *per* COZENS-HARDY, J., at p. 334. Examples of the former are *Moorhouse* v. *Colvin* (1851), 15 Beav. 341, "nor will that be all, she is and shall be noticed in my will, but to what further amount I cannot say," and *Re Fickus, Farina* v. *Fickus, supra*, "You are of course aware that with my large family E. will have a little fortune. She will have a share of what I have after the death of her mother, who I wish to leave in comfortable independence if I should leave her a widow." Examples of definite offers are *Laver* v. *Fielder* (1862), 32 Beav. 1, "I still adhere to my last proposition, to allow E. £100 a year . . . and at my decease she shall be entitled to her share of whatever property I may die possessed of"; *Alt* v. *Alt* (1862), 7 L. T. 266, "if your daughter has, or may have, money, my wish and intention would be, that it should be so settled for her sole and separate use"; *Hammersley* v. *De Biel* (*Baron*) (1845), 12 Cl. & Fin. 45, H. L., "Mr. J. P. T. (the father) also intends to leave a further sum of £10,000 in his will to Miss T. to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. These are the bases of the arrangement, subject of course, to revision, but they will be sufficient for Baron B. to act upon." See also *Luders* v. *Anstey* (1799), 4 Ves. 501; *Coverdale* v. *Eastwood* (1872), L. R. 15 Eq. 121; *Synge* v. *Synge*, [1894] 1 Q. B. 466, C. A.; *Saunders* v. *Cramer* (1842), 3 Dr. & War. 87; *King* v. *Sears* (1835), 2 Cr. M. & R. 48; *Shadwell* v. *Shadwell* (1860), 9 C. B. (N. S.) 159. A letter purporting to bequeath certain property to an intended wife was held not to be a contract to settle the property (*Vincent* v. *Vincent* (1887), 56 L. T. 243, C. A.). See title SETTLEMENTS. As to part performance, see p. 379, *post*.

(*d*) See also on this point *Randall* v. *Morgan* (1805), 12 Ves. 67.

Instructions for a marriage settlement which contain the conditions agreed upon as the basis of the settlement, do not constitute a memorandum of an agreement (*e*), but a memorandum made at the time of the marriage of a verbal agreement made before marriage is sufficient (*f*).

(c) *Agreement not to be performed within a Year.*

Performance not to be within year.

753. Where an agreement distinctly shows upon the face of it that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the Statute of Frauds; but where the contract is such that the whole may possibly be performed within a year, and there is no express stipulation to the contrary, the statute does not apply (*g*).

For example, agreements to pay a sum annually for five years and afterwards an annuity for life (*h*), for a partnership for three years (*i*), to supply goods for a period longer than a year (*k*), have been held to be within the statute (*l*).

Contract of service or hire.

754. A contract of service, or a contract to hire a chattel, for a term of more than a year is within the statute and must be in writing (*m*), and so is a contract for a year's service to commence at a future day (*n*), with the exception that a contract for a year's service to commence on the day after the day on which the contract is made is not within the statute, the reason being that the day of making the contract is not reckoned (*o*). But a general hiring

(*e*) *Caton* v. *Caton* (1867), L. R. 2 H. L. 127.

(*f*) *Barkworth* v. *Young* (1856), 4 Drew. 1; *Re Holland*, *Gregg* v. *Holland*, [1902] 2 Ch. 360, C. A.

(*g*) *Peter* v. *Compton* (1693), Skin. 353; 1 Smith, L. C., 11th ed., 316; *Smith* v. *Westall* (1698), 1 Lord Raym. 316; *Souch* v. *Strawbridge* (1846), 2 C. B. 808, *per* TINDAL, C.J., at p. 815, cited with approval by Lord ESHER, M.R., in *McGregor* v. *McGregor* (1888), 21 Q. B. D. 424, C. A., at p. 429. In the latter case it was held that an agreement between husband and wife to live apart, the husband to allow the wife a weekly sum for maintenance, was not within the statute, because there might have been a reconciliation within the year.

(*h*) *Sweet* v. *Lee* (1841), 3 Man. & G. 452.

(*i*) *Tomkins* v. *Randell* (1871), 19 W. R. 413; and see *Williams* v. *Jones* (1826), 5 B. & C. 108, *per* HOLROYD, J., at p. 110.

(*k*) *Re Pentreguinea Patent Fuel Co.*, *Ex parte Acraman* (1862), 31 L. J. (CH.) 741, C. A.

(*l*) *Boydell* v. *Drummond* (1809), 11 East, 142 (sale of prints by subscription); and compare *Mavor* v. *Pyne* (1825), 3 Bing. 285. In *McGregor* v. *McGregor*, *supra*, confirming *Souch* v. *Strawbridge*, *supra*, and *Boydell* v. *Drummond*, *supra*, it was laid down that if the contract can by possibility be performed within the year the statute does not apply; *Eley* v. *Positive Assurance Co.* (1875), 1 Ex. D. 20 (employment as solicitor during good conduct); and *Davey* v. *Shannon* (1879), 4 Ex. D. 81, were in effect overruled. In *Farrington* v. *Donohoe* (1866), 1 Ir. C. L. 675, an agreement to maintain a child of five years of age until it should be able to maintain itself was held to be within the statute, but the decision is prior to *McGregor* v. *McGregor*, *supra*, with which it does not seem to be consistent. See also *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378, C. A. (tenancy for three years); *Milsom* v. *Stafford* (1899), 80 L. T. 590, C. A. (letting plant for three years).

(*m*) *Bracegirdle* v. *Heald* (1818), 1 B. & Ald. 722; *Giraud* v. *Richmond* (1846), 2 C. B. 835; *Milsom* v. *Stafford*, *supra*.

(*n*) *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123, C. A.; *Snelling* v. *Huntingfield* (1834), 1 Cr. M. & R. 20; and *Bracegirdle* v. *Heald*, *supra*.

(*o*) *Smith* v. *Gold Coast and Ashanti Explorers, Ltd.*, [1903] 1 K. B. 285, 538, C. A. See *dicta* in *Cawthorne* v. *Cordrey* (1863), 13 C. B. (N. S.) 406, and in

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from year to year is not within the statute (*p*); nor is a contract of service for an indefinite period, determinable by reasonable notice (*q*).

Contracts not within the statute.

755. The following are some examples of agreements that have been held not to be within the statute, and so do not require to be in writing:—To pay money to a man on his marriage (*r*), to leave money by will (*s*), to pay money on completion of a voyage that it was possible to complete within a year (*t*); to employ a person as sole agent for the sale of patented articles until the sale of the patent to a company (*u*); and to maintain a child at the request of the defendant for so long as the defendant should think proper (*a*).

Determinable contract.

756. The mere fact that an agreement which contemplates performance over a longer period than a year, such as a contract of service for a term of years, may be terminated by the parties by notice or otherwise during the year does not take it out of the operation of the statute (*b*).

Executed consideration.

757. The statute has no application to contracts for an executed consideration (*c*), or where the contract is to be entirely executed by one party within the year (*d*); nor is a contract under the terms of which it is possible that one of the parties may wholly perform his part of the contract within the year, although the performance by the other party extends over several years (*e*).

Britain v. *Rossiter* (1879), 11 Q. B. D. 123, C. A. *Dollar* v. *Parkington* (1901), 84 L. T. 470, to the contrary, must be considered overruled by *Smith* v. *Gold Coast and Ashanti Explorers, Ltd.*, [1903] 1 K. B. 285, 538.

(*p*) *Beeston* v. *Collyer* (1827), 4 Bing. 309.

(*q*) *Souch* v. *Strawbridge* (1846), 2 C. B. 808, *per* TINDAL, C.J., at p. 815.

(*r*) *Peter* v. *Compton* (1693), Skin. 353.

(*s*) *Ridley* v. *Ridley* (1865), 34 Beav. 478; and see *Wells* v. *Horton* (1826), 4 Bing. 40, and *Fenton* v. *Emblers* (1762), 3 Burr. 1278.

(*t*) *Anon.* (1693), Salk. 280.

(*u*) *Lavelette* v. *Riches* (1908), 24 T. L. R. 336.

(*a*) *Souch* v. *Strawbridge, supra.* For other examples of agreements not within the statute, see *McKay* v. *Rutherford* (1848), 6 Moo. P. C. C. 413; *Murphy* v. *Sullivan* (1865), 11 Ir. Jur. (N. S.) 111; *Knowlman* v. *Bluett* (1873), L. R. 9 Exch. 1, affirmed (1874) *ibid.* 307, Ex. Ch., a promise to pay a certain sum a year for bringing up illegitimate children (appealed against and disposed of on other grounds); *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, C. A., *per* NORTH, J., at p. 276, an agreement for the abandonment of legal proceedings; *Bevan* v. *Carr* (1885), Cab. & El. 499; see also *Smith* v. *Neale* (1857), 26 L. J. (C. P.) 143; *Miles* v. *Bough* (1842), 3 Q. B. 845, and *Francam* v. *Foster* (1692), Skin. 356. In the case of *Collis* v. *Botthamley* (1858), 7 W. R. 87, the defendant by a parol agreement agreed to serve the plaintiff for a year certain to commence at a future date and thenceforth until the parties should determine the same by three months' notice. After serving some years the defendant left at the end of a year without notice, and it was held that the plaintiff could maintain an action for breach of the agreement notwithstanding the Statute of Frauds.

(*b*) *Dobson* v. *Collis* (1856), 1 H. & N. 81; *Birch* v. *Liverpool* (*Earl*) (1829), 9 B. & C. 392; *Lavelette* v. *Riches, supra*; *Re Pentreguinea Patent Fuel Co., Ex parte Acraman* (1862), 31 L. J. (CH.) 741, C. A.

(*c*) *Knowlman* v. *Bluett, supra*; *Souch* v. *Strawbridge, supra.* As to executed consideration, see p. 384, *post.*

(*d*) *Donellan* v. *Read* (1832), 3 B. & Ad. 899, where the plaintiff, a landlord, had laid out £50 on improvements in consideration of the tenants agreeing to pay him £5 more rent; *Smith* v. *Neale, supra.* See 1 Smith, L. C., 11th ed., 319.

(*e*) *Cherry* v. *Heming* (1849), 4 Exch. 631 (assignment of patent, the price to be paid by instalments extending over several years).

(2) *The Essentials of the Writing.*

(a) *The Memorandum or Note.*

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When to be made.

758. The memorandum need not be contemporaneous with the contract; it is sufficient if it be made subsequently to a parol agreement (*f*). But it must be in existence when the action in respect of the contract is commenced (*g*), and for a memorandum to be effective there must be a concluded agreement existing at the time when it is signed (*h*).

Signature.

759. The statute does not require the memorandum to be signed by both parties, but only by the party to be charged. A memorandum signed by one party makes the contract enforceable against him, though it is not signed by the other party (*i*), and a written proposal signed by one party and accepted orally by the other is sufficient to bind the former (*k*). But such a proposal must show to whom it is made (*a*).

Counterpart.

Where an agreement is signed in counterpart, and there is a complete memorandum as against one party, it is not a defence to an action by the other party that there is an error in the memorandum signed by him (*b*).

Form.

760. No special form is required for a memorandum (*c*). It need not be under seal (*d*). Any document conforming to the statutory requisites, and containing all the essential terms of the contract, will be a sufficient memorandum. Thus, a rough draft, the parties contemplating the preparation and execution of a more formal agreement (*e*),

(*f*) *Barkworth* v. *Young* (1856), 26 L. J. (CH.) 153; *Hammersley* v. *De Biel* (*Baron*) (1845), 12 Cl. & Fin. 45, H. L; *Bradford* v. *Roulston* (1858), 8 I. C. L. R. 468; *Schneider* v. *Norris* (1814), 2 M. & S. 286; *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360, C. A.

(*g*) *Lucas* v. *Dixon* (1889), 22 Q. B. D. 357, C. A.; *Bill* v. *Bament* (1841), 9 M. & W. 36.

(*h*) *Munday* v. *Asprey* (1880), 13 Ch. D. 855, *per* FRY, J., at p. 857, in which case it was held that an engrossment of a conveyance containing a recital that the vendor had contracted with the purchaser for the sale to him of land at a certain price, accompanied by a signed letter referring to the engrossment and the payment of the purchase-money, was not a memorandum.

(*i*) *Egerton* v. *Mathews* (1805), 6 East, 307; *Seton* v. *Slade* (1802), 7 Ves. 265; *Laytharp* v. *Bryant* (1836), 3 Scott, 238.

(*k*) *Reuss* v. *Picksley* (1866), L. R. 1 Exch. 342, Ex. Ch.

(*a*) *Williams* v. *Jordan* (1877), 6 Ch. D. 517.

(*b*) *Butcher* v. *Nash* (1889), 61 L. T. 72.

(*c*) *Welford* v. *Beazely* (1747), 3 Atk. 503. A blank promise to pay, not addressed to anybody but headed with the name of the Congregational Union Jubilee Fund, and filled in and signed, was held not a memorandum within the Statute of Frauds (*Re Hudson, Creed* v. *Henderson* (1885), 33 W. R. 819).

(*d*) *Wheeler* v. *Newton* (1690), Prec. Ch. 16.

(*e*) *Gray* v. *Smith* (1889), 43 Ch. D. 208, C. A. A memorandum contained a statement that the defendant had accepted the title, and the lease was to be granted by the lessor as the defendant might direct, and this was held sufficient (*Morgan* v. *Worthington* (1878), 38 L. T. 443). Where, in the case of letters, the drawing up of a formal instrument between the parties is contemplated, it is a question of construction whether the letters should constitute a binding agreement or that there should be no binding agreement until the instrument had been drawn up; see *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124; *Bonnewell* v. *Jenkins* (1878), 8 Ch. D. 70; *Bolton* v. *Lambert* (1889), 41 Ch. D. 295; *Filby* v. *Hounsell*, [1896] 2 Ch. 737; *North* v. *Percival*, [1898] 2 Ch. 128.

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a recital in a will (*f*), an affidavit (*g*), a bill of parcels (*h*), a letter to a third person (*i*), an offer acted upon (*k*), a receipt (*l*), or a resolution in the minute-book of a company (*m*), may be a sufficient memorandum. A telegram sent by one of the parties may be a sufficient memorandum to bind that party (*n*), and a bill of exchange may be a sufficient memorandum, if the liability sought to be enforced is apparent on the face of the bill (*o*). A letter by a principal to his own agent, recognising the terms of a contract made by the agent on his behalf, is a sufficient memorandum to charge the principal in an action by the other contracting party (*p*).

A document is available as a memorandum, although it contains a repudiation of the contract, if it recognises all the terms thereof (*q*), and does not set up any fresh term (*r*). But letters

(*f*) *Re Hoyle, Hoyle* v. *Hoyle*, [1893] 1 Ch. 84, C. A.

(*g*) *Barkworth* v. *Young* (1856), 4 Drew. 1.

(*h*) *Schneider* v. *Norris* (1814), 2 M. & S. 286.

(*i*) *Bateman* v. *Phillips* (1812), 15 East, 272; *Longfellow* v. *Williams* (1804), Peake's Add. Cas. 225; *Gibson* v. *Holland* (1865), L. R. 1 C. P. 1; *Moore* v. *Hart* (1682), 1 Vern. 110, 201.

(*k*) *Powers* v. *Fowler* (1854), 4 E. & B. 511; *Smith* v. *Neale* (1857), 2 C. B. (N. S.) 67; see also *Forster* v. *Rowland* (1861), 7 H. & N. 103.

(*l*) *Evans* v. *Prothero* (1852), 1 De G. M. & G. 572. The decision in this case as to the admissibility of the document, though unstamped, cannot now be relied on (see p. 530, *post*).

(*m*) *Jones* v. *Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314.

(*n*) *McBlain* v. *Cross* (1871), 25 L. T. 804; and see *Godwin* v. *Francis* (1870), L. R. 5 C. P. 295; *Pitts* v. *Beckett* (1845), 13 M. & W. 743. It is doubtful whether a copy of a contract taken by a machine and put into a letter-book is a sufficient memorandum.

(*o*) *J. W. Holmes & Co.* v. *Amaza Durkee* (1883), Cab. & El. 23. Thus, if a plaintiff draws and indorses bills to the defendant and the defendant reindorses them to the plaintiff, the intention being that the defendant should be a surety for the price of goods supplied to her son, the bill is a sufficient memorandum (*Wilkinson* v. *Unwin* (1881), 7 Q. B. D. 636, C. A.); or if a bill is drawn by the plaintiff upon the defendant payable to the order of the defendant and is indorsed by the defendant and delivered to the plaintiff, the intention being that the defendant should become surety for his son, the bill is a sufficient memorandum (*J. W. Holmes & Co.* v. *Amaza Durkee*, *supra*). But *contrà* if the liability to be enforced is not apparent on the face of the bill and proof of a special contract causing the liability is necessary (*Steele* v. *M'Kinlay* (1880), 5 App. Cas. 754).

(*p*) *Gibson* v. *Holland* (1865), L. R. 1 C. P. 1.

(*q*) *Bailey* v. *Sweeting* (1861), 9 C. B. (N. S.) 843; *Elliott* v. *Dean* (1884), Cab. & El. 283; *Wilkinson* v. *Evans* (1866), L. R. 1 C. P. 407. In *Leather Cloth Co.* v. *Hieronimus* (1875), L. R. 10 Q. B. 140, the defendant had verbally ordered goods to be sent by a particular route. The goods were sent by another route, of which the seller informed the defendant by letter, inclosing an invoice. Defendant subsequently wrote a letter recognising the original order, but declining to pay on account of the change of route. The jury having found that the defendant had by his conduct ratified the change of route, it was held that the letter and invoice were a sufficient memorandum.

(*r*) *Smith* v. *Surnam* (1829), 9 B. & C. 561, in which case the repudiation set up the fresh term that the goods should be sound and in good condition. Where the repudiation was on the ground that the goods had not been delivered in time it was held there was no memorandum (*Richards* v. *Porter* (1827), 6 B. & C. 437; and see *Cooper* v. *Smith* (1812), 15 East, 103). But where the repudiation identified the contract and thus showed that the defendant was wrong in repudiating the contract on the ground that the goods had not been delivered in time it was held there was a sufficient memorandum (*Buxton* v. *Rust* (1871), L. R. 7 Exch. 1).

which show that there is a dispute between the parties as to what are the terms of the contract do not constitute a sufficient memorandum, and in such a case parol evidence is not admissible to show what were the actual terms (*s*).

(b) *Connected Documents.*

Memorandum in several documents.

761. When one document refers to another the two may be read together, so as to constitute a complete memorandum (*t*).

The same rule applies if the documents can be connected together by reasonable inference, although there is no express reference from one document to the other (*u*).

Parol evidence.

762. Parol evidence is admissible to identify a written document

(*s*) *Archer* v. *Baynes* (1850), 5 Exch. 625; *Richards* v. *Porter* (1827), 6 B. & C. 437; *Cooper* v. *Smith* (1812), 15 East, 103.

(*t*) *Ridgway* v. *Wharton* (1857), 6 H. L. Cas. 238.

(*u*) *Wylson* v. *Dunn* (1887), 34 Ch. D. 569; *Peek* v. *N. Stafford Rail. Co.* (1858), E. B. & E. 958, *per* WILLIAMS, J., at p. 1000; *ibid.* (1863) 32 L. J. (Q. B.) 241, *per* Lord WESTBURY, at p. 270; *Studds* v. *Watson* (1884), 28 Ch. D. 305 (two documents, both referring to the same parol contract and together containing all the terms); *Baumann* v. *James* (1868), 3 Ch. App. 508; *Jackson* v. *Lowe* (1822), 7 Moore (C. P.), 219 (correspondence referring to the contract and to an alleged breach thereof); *Macrory* v. *Scott* (1850), 5 Exch. 907. Examples of documents held sufficiently connected are: Agreement and receipt (*Long* v. *Millar* (1879), 4 C. P. D. 450, C. A.); two letters (*Sheers* v. *Thimbleby & Son* (1897), 76 L. T. 709, C. A.); letter written on the back of an invoice (*Wilkinson* v. *Evans* (1866), L. R. 1 C. P. 407); letters and an order (*Allen* v. *Bennet* (1810), 3 Taunt. 169); a bill of parcels and a letter referring to an order (*Saunderson* v. *Jackson* (1800), 2 Bos. & P. 238); instructions for a telegram signed by the party, the telegram itself and letters (*Godwin* v. *Francis* (1870), L. R. 5 C. P. 295); letter and receipt (*Studds* v. *Watson*, *supra*); agreement for sale of property and plan not referred to, but described as a plan of the property sold (*Nene Valley Drainage Commissioners* v. *Dunkley* (1876), 4 Ch. D. 1, C. A.); application to a society for workmen and an agreement by a workman to accept the employment (*Crane* v. *Powell* (1868), L. R. 4 C. P. 123); receipt of auctioneer, memorandum, and conditions of sale (*Shardlow* v. *Cotterell* (1881), 20 Ch. D. 90); receipt and letter referring to the same parol contract (*Studds* v. *Watson*, *supra*). Examples of documents held insufficiently connected are: Letters (*Potter* v. *Peters* (1895), 72 L. T. 624); catalogue and sales ledger (*Peirce* v. *Corf* (1874), L. R. 9 Q. B. 210); letter and document described as a supplement contained in same envelope (*Kronheim* v. *Johnson* (1877), 7 Ch. D. 60; but see *Pearce* v. *Gardner*, [1897] 1 Q. B. 688, C. A.); memorandum and letter (*Smith* v. *Dixon* (1839), 3 Jur. 770); sold notes and letters (*McCaul* v. *Strauss & Co.* (1883), Cab. & El. 106; and see *Taylor* v. *Smith*, [1893] 2 Q. B. 65, C. A.); where the first of two papers was in the words "I agree to let the premises in G. L., containing three stables etc., for the same rent and subject to the same conditions that I hold them myself," it was held (Lord CAMPBELL, L.C., *diss.*) that this paper, though ratified by the proposed lessee, did not satisfy the statute because it did not state the duration of the term (*Fitzmaurice* v. *Bayley* (1857), 9 H. L. Cas. 78); catalogue with conditions of sale and entry in sales ledger (*Peirce* v. *Corf*, *supra*). In order to satisfy the Statute of Frauds an entry in an auctioneer's sales book must refer to the conditions of sale subject to which the property is sold, so as to identify them, upon production, as being the conditions mentioned in the entry (*Rishton* v. *Whatmore* (1878), 8 Ch. D. 467). When at a sale the conditions are not attached to the catalogue or referred to by it there is not a sufficient memorandum by the auctioneer writing the defendant's name against the article in the catalogue (*Hinde* v. *Whitehouse* (1806), 7 East, 558, *per* Lord ELLENBOROUGH, C.J., at p. 570; *Kenworthy* v. *Schofield* (1824), 2 B. & C. 945).

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referred to in another written document so as to connect them (*x*), and to prove that a writing exists and must have been impliedly referred to by a writing signed by the party to be charged, though not therein expressly referred to, so as to make a complete memorandum (*a*).

But parol evidence cannot be given to amplify an incomplete memorandum (*b*), nor to connect documents which contain no reference to one another, and cannot be connected by reasonable inference from the circumstances of the case (*c*).

Subsequent writing.

763. Where a contract or note or memorandum thereof in writing exists which binds one party, any subsequent note in writing, signed by the other, is sufficient to bind him, provided it either contains in itself the terms of the contract or refers to any writing which contains them (*d*).

But where the terms of the contract cannot be made out from the connected documents (*e*), or where a term of the contract is omitted therefrom, there is no memorandum sufficient to satisfy the statute (*f*).

(c) *Parties.*

Description.

764. The memorandum must describe the parties in such a manner that there can be no fair or reasonable dispute as to who are the respective contracting parties, and which of them is the buyer and which the seller, or as the case may be (*g*). Where the

(*x*) *Morris* v. *Wilson* (1859), 5 Jur. (N. S.) 168; *Hodges* v. *Horsfall* (1829), 1 Russ. & M. 116 (parol evidence admitted to identify plan referred to); *Jones* v. *Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314, C. A. An envelope and a letter may be connected together by parol evidence to supply the name of one party written on the envelope and not contained in the letter (*Pearce* v. *Gardner*, [1897] 1 Q. B. 688, C. A.). Where the defendant in a letter referred to an arrangement with the plaintiff, and it was shown that there was no other arrangement except a contract contained in a memorandum signed by the plaintiff, it was held there was a sufficient memorandum (*Cave* v. *Hastings* (1881), 7 Q. B. D. 125). In *Oliver* v. *Hunting* (1890), 44 Ch. D. 205, in which case a memorandum of agreement signed by the vendor omitted to mention the property sold, but a letter acknowledging the receipt of the money and describing the property was also written by him, it was held that evidence was admissible to show the circumstances under which the letter was written so as to connect it with the memorandum.

(*a*) *Craig* v. *Elliott* (1885), 15 L. R. Ir. 257.

(*b*) *Holmes* v. *Mitchell* (1859), 7 C. B. (N. S.) 361. But parol evidence is admissible to identify the subject-matter of a promise; *Shortrede* v. *Cheek* (1834), 1 Ad. & El. 57; *Bateman* v. *Phillips* (1812), 15 East, 272; see also *Mumford* v. *Gething* (1859), 7 C. B. (N. S.) 305; *New Zealand Bank* v. *Simpson*, [1900] A. C. 182; *Haigh* v. *Brooks* (1839), 10 Ad. & El. 309; *Goldshede* v. *Swan* (1847), 1 Exch. 154; *Hoad* v. *Grace* (1862), 7 H. & N. 494 ("goods supplied" construed to mean goods to be supplied); *Way* v. *Hearn* (1863), 13 C. B. (N. S.) 292.

(*c*) *Boydell* v. *Drummond* (1809), 11 East, 142; *Taylor* v. *Smith*, [1893] 2 Q. B. 65, C. A.

(*d*) *Dobell* v. *Hutchinson* (1835), 3 Ad. & El. 355; *Cave* v. *Hastings* (1881), 7 Q. B. D. 125.

(*e*) *Taylor* v. *Smith*, [1893] 2 Q. B. 65, C. A., where the documents consisted of an advice note, an indorsement thereon, and a letter.

(*f*) *M'Mullen* v. *Helberg* (1879), 6 L. R. Ir. 463, in which case the entry in the auctioneer's book did not mention that the sale was by sample and there was no description of the quality of the goods. Subsequent correspondence mentioning the quantities, prices, and places of deposit of the goods was held not to amount to a sufficient memorandum on account of the same defect.

(*g*) *Potter* v. *Duffield* (1874), L. R. 18 Eq. 4; *Williams* v. *Byrnes* (1863), 1

memorandum is ambiguous as to which party is buyer and which seller, parol evidence is admissible to show the surrounding circumstances from which the relative positions may be inferred (*h*). A memorandum which does not contain either the name or a sufficient description of each of the parties is insufficient (*i*).

Ambiguity.

765. It is sufficient if the memorandum contains the names of both of the parties entering into the contract, though one of them may be an agent for an undisclosed principal (*k*).

Agent.

766. If it can be ascertained who are the parties from some other document which is sufficiently connected with the memorandum by clear reference, this will cure the defect in the memorandum (*l*). For example, it is sufficient if the vendor's name is written in the fly-leaf of the vendor's order book containing a memorandum naming or describing the purchaser (*m*), or if the vendor's name is stamped on a leather cover in which the order-book containing such a memorandum is kept (*n*).

Connected documents.

767. The term "vendor" is not a sufficient description of one of the parties (*o*), nor is "client," "friend," or "principal" (*p*). Nor is it sufficient to describe the party as "proposing lender" or "intending lender" (*q*); and where the memorandum inaccurately describes the vendor as the vendor's solicitor it is insufficient (*r*). The fact that the purchaser knew who was the vendor in any of such cases is immaterial (*r*).

Insufficiency of description.

Moo. P. C. C. (N. S.) 154; *Williams* v. *Lake* (1859), 29 L. J. (Q. B.) 1; *Vandenbergh* v. *Spooner* (1866), L. R. 1 Exch. 316.

(*h*) *Newell* v. *Radford* (1867), L. R. 3 C. P. 52. Where S. agreed to buy marble purchased by V. lying at Lyme Cob, it was held by POLLOCK, C.B., and BRAMWELL and CHANNELL, BB. (MARTIN, B., *dubitante*), that the court could not infer that V. was the seller (*Vandenbergh* v. *Spooner*, *supra*).

(*i*) *Champion* v. *Plummer* (1805), 5 Esp. 240; *Graham* v. *Musson* (1839), 5 Bing. (N. C.) 603; *Williams* v. *Jordan* (1877), 6 Ch. D. 517 (offer to take a lease signed by person making the offer and attested by the proposed lessor's agent, but not naming or describing the proposed lessor, accepted in writing by the agent without naming the lessor, the letter of acceptance not being signed by the proposed lessees nor referred to in any other document, was held, no sufficient memorandum to bind the proposed lessees); *Williams* v. *Lake*, *supra* (letter of guarantee not naming or describing the person for whom it was intended).

(*k*) *Filby* v. *Hounsell*, [1896] 2 Ch. 737; *Morris* v. *Wilson* (1859), 5 Jur. (N. S.) 168

(*l*) *Warner* v. *Willington* (1856), 3 Drew. 523. For an example of documents not falling within this description, see *Coombs* v. *Wilkes*, [1891] 3 Ch. 77. See p. 369, *ante*.

(*m*) *Sarl* v. *Bourdillon* (1856), 1 C. B. (N. S.) 188; but not if the vendor's name does not appear in the order-book at all (*Jacob* v. *Kirk* (1839), 2 Mood. & R. 221).

(*n*) *Jones Brothers* v. *Joyner* (1900), 82 L. T. 768.

(*o*) *Potter* v. *Duffield* (1874), L. R. 18 Eq. 4; *Thomas* v. *Brown* (1876), 1 Q. B. D. 714.

(*p*) *Per* Lord CAIRNS in *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124; but see *Cropper* v. *Cook* (1868), L. R. 3 C. P. 194, at p. 200.

(*q*) *Pattle* v. *Anstruther* (1893), 69 L. T. 175, C. A.

(*r*) *Jarrett* v. *Hunter* (1886), 34 Ch. D. 182. The reference in a condition to certain deeds which, when examined, showed a grant to a person who was a trustee for the vendor does not cure the defect (nor would it if the deeds showed who the vendor was, *ibid.*, *per* KAY, J.). So where a condition stated that the vendor was a trustee for sale, which was an error, it was held to be a fatal defect in the memorandum (*Butcher* v. *Nash* (1889), 61 L. T. 72).

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Sufficiency of description.

On the other hand, "proprietor," "owner," "mortgagee" (*s*), or "a trustee selling under a trust for sale" (*t*), or any other description which, having regard to the circumstances of the case, clearly shows who is intended, is a sufficient description of one of the parties; and "In consideration of you having this day paid me the sum of £50 I hereby agree to grant you or your assigns a further lease" of certain premises is a sufficient description of the person to whom the further lease is to be granted, it being proved that the existing lessee had in fact paid the £50 (*a*).

It is also sufficient if the memorandum shows that the vendors are a company in possession of the property dealt with, who have been carrying on operations there (*b*).

(d) *Terms.*

Contents of memorandum.

768. The memorandum, in order to be a sufficient compliance with the requirements of the statute, must contain all the essential terms of the contract (*c*), and must show that the parties have agreed to those terms (*d*).

Must describe property sold.

In particular, in a contract of sale the memorandum must describe the property sold in such a way as, having regard to the circumstances of the case, shows clearly what is intended to be sold (*e*).

(*s*) *Sale* v. *Lambert* (1874), L. R. 18 Eq. 1; *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124.

(*t*) *Catling* v. *King* (1877), 5 Ch. D. 660, C. A.

(*a*) *Carr* v. *Lynch*, [1900] 1 Ch. 613.

(*b*) *Commins* v. *Scott* (1875), L. R. 20 Eq. 11.

(*c*) See *Gray* v. *Smith* (1889), 43 Ch. D. 208, C. A.; *Caddick* v. *Skidmore* (1857), 3 Jur. (N. S.) 1185; *Cox* v. *Middleton* (1854), 2 Drew. 209. An agreement to employ a managing director for a term of five years does not comply with the Statute of Frauds if it does not say when the service is to commence (*Re Alexander's Timber Co.* (1901), 70 L. J. (CH.) 767). A memorandum that A. has paid B. a certain sum as a deposit and in part payment of £1,000 for the purchase of a specified property, the terms to be expressed in an agreement to be signed as soon as prepared, is insufficient (*Wood* v. *Midgley* (1854), 5 De G. M. & G. 41, C. A.). The statute "is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties" (*per* Lord SELBORNE, L.C., in *Jervis* v. *Berridge* (1873), 8 Ch. App. 351, at p. 360; and see *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311, at p. 323). Where two letters of a correspondence seem to constitute a complete contract and to satisfy the statute, the party to be charged was allowed to show by other letters and by evidence of conversations that a complete contract was not intended by the two letters (*Hussey* v. *Horne-Payne*, *supra*); see also *Bristol etc. Aerated Bread Co.* v. *Maggs* (1890), 44 Ch. D. 616; *Watson* v. *McCallum* (1903), 87 L. T. 547.

(*d*) *Archer* v. *Baynes* (1850), 5 Exch. 625; *Richards* v. *Porter* (1827), 6 B. & C. 437; *Cooper* v. *Smith* (1812), 15 East, 103.

(*e*) The following descriptions have been held sufficient, parol evidence being admissible to show to what they referred:—"This place" (*Waldron* v. *Jacob and Millie* (1870), I. R. 5 Eq. 131); "property," the date of the sale being given (*Shardlow* v. *Cotterell* (1881), 20 Ch. D. 90, C. A.; and see *Bleakley* v. *Smith* (1840), 11 Sim. 150; *McMurray* v. *Spicer* (1868), L. R. 5 Eq. 527); "my house" (*Cowley* v. *Watts* (1854), 17 Jur. 172); "Mr. Ogilvie's house" (*Ogilvie* v. *Foljambe* (1817), 3 Mer. 53); "the house etc. in Newport," coupled with a reference to the deeds being in the possession of a named individual (*Owen* v. *Thomas* (1834), 3 My. & K. 353); "the intended new public-house at Putney" (*Wood* v. *Scarth* (1855), 2 K. & J. 33); "twenty-four acres of land, freehold, and all appurtenances at Totmonslow" (*Plant* v. *Bourne*, [1897] 2 Ch. 281, C. A.); "the executors of" a named person (*Hood* v. *Barrington* (1868), L. R. 6 Eq. 218); "proposing lender"

Where a memorandum signed by the defendant contains alternative offers, one of which is accepted, the contract is sufficiently evidenced in writing within the statute (*f*).

Alternative offers.

769. Parol evidence is admissible to show that the written memorandum does not contain the actual terms agreed upon by the parties (*g*). In such a case the effect is that if the contract is one which is not enforceable unless evidenced by writing there is no enforceable contract at all. The apparent agreement as evidenced by the writing cannot be enforced because it is not the real agreement, and the real agreement cannot be enforced because it cannot be proved (*h*). Parol evidence is also admissible to prove assent by the defendant to alterations made in a written contract after it has been signed by him (*i*).

Parol evidence.

Variation by parol.

770. If the contract is subsequently varied, as to one of its terms, by parol, the agreement so varied cannot be enforced. Thus, if a contract is made for delivery of goods on a certain day, any agreement whereby the day of delivery is altered must, in order to be enforceable, be in writing (*j*).

Substituted performance.

Parol evidence is not admissible to prove an alteration of terms which creates a substituted contract (*k*). But an assent to a substituted mode of performing one of the terms of an agreement need not be in writing, though the original contract must have been (*l*); and if the time for delivery of goods is extended by parol, no rescission of the original written agreement is thereby effected, and such original agreement therefore remains enforceable (*m*).

(*Pattle* v. *Anstruther* (1894), 69 L. T. 175); "your wool" (*Macdonald* v. *Longbottom* (1859), 1 E. & E. 977). But the words "the property" were held an insufficient description of colliery plant and stock (*Vale of Neath Colliery Co.* v. *Furness* (1876), 45 L. J. (CH.) 276), and a memorandum referring to an ascertained quantity of whisky is not sufficient if the quantity was to be ascertained by a re-dip (*Mahalen* v. *Dublin and Chapelizod Distillery Co.* (1877), 11 I. R. C. L. 83). An agreement for a lease not stating the date of commencement does not satisfy the statute (*Marshall* v. *Berridge* (1882), 19 Ch. D. 233, overruling *Jaques* v. *Millar* (1877), 6 Ch. D. 153). See also *May* v. *Thompson* (1882), 20 Ch. D. 705; *Humphery* v. *Conybeare* (1899), 80 L. T. 40.

(*f*) *Lever* v. *Koffler*, [1901] 1 Ch. 543, following *dictum* in *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311.

(*g*) *Lockett* v. *Nicklin* (1848), 2 Exch. 93.

(*h*) *Goss* v. *Nugent* (*Lord*) (1833), 5 B. & Ad. 58; *Sanderson* v. *Graves* (1875), L. R. 10 Exch. 234; *Emmet* v. *Dewhirst* (1851), 21 L. J. (CH.) 497. It is immaterial whether the term altered is essential or not (*Marshall* v. *Lynn* (1840), 6 M. & W. 109). So if the day of the completion of a purchase of an interest in land in a written agreement is verbally postponed, the agreement so altered cannot be enforced (*Stowell* v. *Robinson* (1837), 3 Bing. (N. C.) 928). And see *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634.

(*i*) *Stewart* v. *Eddowes* (1874), L. R. 9 C. P. 311.

(*j*) See note (*h*), *supra*.

(*k*) *Plevins* v. *Downing* (1876), 1 C. P. D. 220.

(*l*) *Leather-Cloth Co.* v. *Hieronimus* (1875), L. R. 10 Q. B. 140; *Hickman* v. *Haynes* (1875), L. R. 10 C. P. 598 (performance delayed beyond the stipulated time at the request of the defendant).

(*m*) *Noble* v. *Ward* (1867), L. R. 2 Exch. 135, Ex. Ch.; and see *Moore* v. *Campbell* (1854), 10 Exch. 323. Where the defendant failed to deliver goods under a written agreement, and the plaintiff at his verbal request delayed in purchasing the goods elsewhere, it was held that there was no new contract, but merely a forbearance on the part of the plaintiff, and therefore the defendant

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Considera-tion.

771. Except in the case of a special promise to answer for the debt, default, or miscarriage of another person, which is specially excepted by s. 3 of the Mercantile Law Amendment Act, 1856 (*a*), the memorandum must show the consideration for the contract (*b*). It is not necessary that the consideration should appear in express terms; it is sufficient if the memorandum is so framed that any person of ordinary capacity must infer from the perusal of it what was the actual consideration upon which the undertaking was given. But a mere conjecture, however plausible, as to what is the consideration is not sufficient to satisfy the statute. There must be a well-grounded inference, to be necessarily collected from the terms of the memorandum, as to the nature of the consideration (*c*).

It is sufficient to satisfy the statute if the consideration can be gathered by necessary inference from the wording of the promise, as where the promise is upon the terms of some condition being performed, reference to which is contained in the same writing that contains the promise (*d*).

could not set up the Statute of Frauds (*Ogle* v. *Vane* (*Earl*) (1868), L. R. 3 Q. B. 272, Ex. Ch.).

(*a*) 19 & 20 Vict. c. 97. The section is as follows:—"No special promise to be made by any person after the passing of this Act to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document." But there must be in fact valuable consideration as in the case of other simple contracts, and a past debt is not sufficient, unless there is evidence of forbearance (*Morrell* v. *Cowan* (1877), 7 Ch. D. 151, C. A.; *Oldershaw* v. *King* (1857), 2 H. & N. 517; *Coles* v. *Pack* (1868), L. R. 5 C. P. 65; *Wynne* v. *Hughes* (1873), 21 W. R. 628; *Crears* v. *Hunter* (1887), 19 Q. B. D. 341; compare *Wigan* v. *English and Scottish Life Assurance Co.*, [1909] 1 Ch. 291, 297), or that the guarantee was intended to extend to future advances (*Haigh* v. *Brooks* (1839), 10 Ad. & El. 309, Ex. Ch.; *Wood* v. *Benson* (1831), 2 Cr. & J. 94; *Raikes* v. *Todd* (1838), 8 Ad. & El. 846; *Kennaway* v. *Treleaven* (1839), 5 M. & W. 498; *Johnstone* v. *Nicholls* (1845), 1 C. B. 251; *Chapman* v. *Sutton* (1846), 2 C. B. 634). And see title GUARANTEE.

(*b*) *Wain* v. *Warlters* (1804), 5 East, 10; 1 Smith, L. C., 11th ed., 323, in which case it was held that a promise to pay the debt of a third person must show the consideration; *Saunders* v. *Wakefield* (1821), 4 B. & Ald. 595; 5 B. & Ald. 559; *Sweet* v. *Lee* (1841), 4 Scott (N. R.), 77. The price must be stated if actually agreed (*Elmore* v. *Kingscote* (1826), 5 B. & C. 583); but not if the sale is for an implied reasonable price (*Hoadley* v. *M'Laine* (1834), 10 Bing. 482).

(*c*) *Hawes* v. *Armstrong* (1835), 1 Scott, 661; see judgment of TINDAL, C.J. An indorsement on an agreement between A. and B. made as part of the same transaction, whereby C. undertakes that A. shall perform all the covenants in the agreement, shows a sufficient consideration for C.'s promise (*Coldham* v. *Showler* (1846), 3 C. B. 312). A letter from A. to B. in which A. refers to a claim by B. on A.'s brother and undertakes to pay the amount within a certain period shows no consideration (*James* v. *Williams* (1834), 5 B. & Ad. 1109). An agreement by A. to work for B. and no other person from a certain date for twelve months, and afterwards from twelve months and to twelve months until A. shall give B. twelve months' notice in writing, shows no consideration on the part of B. (*Sykes* v. *Dixon* (1839), 1 Per. & Dav. 463). See also *Bentham* v. *Cooper* (1839), 5 M. & W. 621; *Jarvis* v. *Wilkins* (1841), 7 M. & W. 410. Cases in which it was held sufficiently clear that the consideration was the marriage of a daughter are *Coverdale* v. *Eastwood* (1872), L. R. 15 Eq. 121, and *Laver* v. *Fielder* (1862), 11 W. R. 245, while in *Re Eyre*, *McAndrew* v. *Norris* (1895), 43 W. R. 538, the contrary was held. As to consideration, see p. 383, *post*.

(*d*) *Powers* v. *Fowler* (1855), 4 E. & B. 511, where defendant's solicitor wrote

772. A memorandum is incomplete if it does not state the price of goods sold where such price has been agreed on (*e*). But where no price has been fixed for the goods the memorandum may be sufficient although the price is not mentioned, because in such a case the law will infer that the sale is for a reasonable price (*f*). It may, however, be proved by parol evidence that the agreement was in fact for sale at a fixed price, so as to defeat a memorandum, which does not mention the price (*g*). Price of goods sold.

773. In the case of a guarantee the person to be guaranteed must be named or otherwise sufficiently described in the memorandum (*h*). Guarantee.

774. In contracts between landlord and tenant the writing or writings relied upon to satisfy the statute must contain all the material terms of the lease (*i*). Contract for lease.

(e) *Signature.*

775. It is sufficient if the memorandum bears the signature of the party to be charged in the action (*k*), unless it is shown that he only intended to be bound in the event of the other party also signing a memorandum, so as to make the other party's signature a condition precedent to his liability (*l*). Signature.

The signature must be so placed as to show that it was intended to relate and refer to, and that in fact it does relate and refer to, every part of the instrument (*m*). It does not, however, signify in what part of the instrument the signature is to be found (*n*), if it Position of signature.

that to save his clients' credit from destruction he would undertake to settle a purchase within two months "if that will be satisfactory to your clients"; *Egerton* v. *Mathews* (1805), 6 East, 307 (letter agreeing to give a certain price for goods held sufficient, the consideration sufficiently appearing by inference).

(*e*) *Goodman* v. *Griffiths* (1857), 1 H. & N. 574. A memorandum stating the price "net cash" is not sufficient if the agreement gave an alternative of payment by bill at four months, with bank rate of interest added (*Mahalen* v. *Dublin and Chapelizod Distillery Co.* (1877), 11 I. R. C. L. 83).

(*f*) *Valpy* v. *Gibson* (1847), 4 C. B. 837. Thus an order for goods "on moderate terms" is sufficient (*Ashcroft* v. *Morrin* (1842), 4 Man. & G. 450). This principle has no application to s. 4 of the Statute of Frauds (29 Car. 2, c. 3), the only exception to which is made by s. 3 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97).

(*g*) *Acebal* v. *Levy* (1834), 10 Bing. 376.

(*h*) *Williams* v. *Lake* (1859), 1 L. T. 56. See title GUARANTEE.

(*i*) Such as the parties, the beginning and length of the term, the rent, and the subject-matter of the lease. For fuller particulars, see title LANDLORD AND TENANT.

(*k*) *Laythoarp* v. *Bryant* (1836), 3 Scott, 238; *Ormond* (*Lord*) v. *Anderson* (1813), 2 Ball & B. 363, at p. 370; *Fowle* v. *Freeman* (1804), 9 Ves. 351; *Seton* v. *Slade* (1802), 7 Ves. 265; *Egerton* v. *Mathews* (1805), 6 East, 307; *Liverpool Borough Bank* v. *Eccles* (1859), 4 H. & N. 139.

(*l*) *Moore* v. *Campbell* (1854), 10 Exch. 323.

(*m*) *Caton* v. *Caton* (1867), L. R. 2 H. L. 127. Thus, a signature to a letter will not cover a postcript headed "supplement" and written on a separate piece of paper which was sent with the letter but was not referred to in it (*Kronheim* v. *Johnson* (1877), 7 Ch. D. 60); and a name inserted in the body of an instrument and applicable to particular purposes only is not sufficient (*Stokes* v. *Moore* (1786), 1 Cox, Eq. Cas. 219).

(*n*) *Ogilvie* v. *Foljambe* (1817), 3 Mer. 53. Thus, an acceptance in the third person is sufficient (*ibid.*); and a memorandum "Mr. Wilmot Parker has agreed etc.," written by Parker, is sufficient (*Propert* v. *Parker* (1830), 1 Russ. & M. 625). Such a memorandum is sufficient, although the christian name is

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is inserted in such a manner as to have the effect of authenticating the whole of the instrument.

Purpose of signature.

776. It is not enough that the party to be charged is identified by the memorandum; he is required to sign it (*a*), but if it is signed it matters not for what purpose the signature was put, if only it was put to attest the document as that which contains the terms of the contract (*b*).

What amounts to a signature.

777. A signature in pencil is sufficient (*c*), and also a signature by initials (*d*), or by means of a stamp (*e*); a mark is sufficient and

omitted (*Lobb* v. *Stanley* (1844), 5 Q. B. 574: "Mr. Stanley etc."). A memorandum "I James Crockford etc." is sufficiently signed by Crockford although signed at the end by the other party to it and not so signed by Crockford (*Knight* v. *Crockford* (1794), 1 Esp. 190). The name of the auctioneer printed on the back of particulars and conditions of sale is not a signature as agent of the vendor for the purpose of completing the memorandum (*Dyas* v. *Stafford* (1882), 9 L. R. Ir. 520, C. A.). The signing of articles of association is not a signing of an agreement between the shareholders and another person not a party to them (*Eley* v. *Positive Assurance Co.* (1875), 1 Ex. D. 20). Signing an agreement for a lease is sufficient when it is a reasonable inference that the signature is in the capacity of the tenant mentioned in the agreement (*Stokell* v. *Niven* (1889), 61 L. T. 18, C. A.; see also *Caton* v. *Caton* (1867), L. R. 2 H. L. 127).

(*a*) *Thynne* (*Lady E.*) v. *Glengall* (*Earl*) (1848), 2 H. L. Cas. 131; *Selby* v. *Selby* (1817), 3 Mer. 2; *Morison* v. *Turnour* (1811), 18 Ves. 175. Thus, a letter concluding "your affectionate mother" is not signed (*ibid.*). An agreement containing the names of the contracting parties and at the end the words "as witness our hands," which is not signed, is not a sufficient memorandum (*Hubert* v. *Treherne* (1842), 4 Scott (N. R.), 486); and altering a draft is not signing it (*Hawkins* v. *Holmes* (1721), 1 P. Wms. 770). The mere fact that a memorandum signed by the plaintiff contains at its head the name and address of the defendant does not constitute a signature by the defendant (*Hucklesby* v. *Hook* (1900), 82 L. T. 117). But where a person wishing to sell sends to a person desiring to buy a document containing the name of the former person, though it may be in print, yet in such a way as to show that the sender recognised it to be his own name, and containing the terms of a contract, is a sufficient memorandum to charge the sender (*Tourret* v. *Cripps* (1879), 27 W. R. 706, *per* HALL, V.-C.). Thus a letter not signed, containing an offer of a lease, with the words "From Richard L. Cripps," with his address printed at the head, is sufficiently signed by Cripps (*ibid.*); or if the defendant fills in the name of the plaintiff as buyer on a printed paper in which the defendant's name is printed as seller there is a sufficient memorandum signed by the defendant (*Schneider* v. *Norris* (1814), 2 M. & S. 286). A memorandum "John Bleakley agrees with J. R. Bridges to take the property etc.," drawn up by J. R. Bridges, is sufficiently signed by him (*Bleakley* v. *Smith* (1840), 11 Sim. 150); and an entry "Sold John Dodgson etc.," made by Dodgson, the defendant, signed by the agent of the plaintiff and intended by both parties to be a memorandum of the contract, is sufficiently signed by the defendant (*Johnson* v. *Dodgson* (1837), 2 M. & W. 653). Or, again, if an agent of the defendant prepares a document containing his name, and lays it before the plaintiff for signature, that is a sufficient signing by the defendant (*Evans* v. *Hoare*, [1892] 1 Q. B. 593). A signature by an auctioneer on behalf of an undisclosed proprietor is sufficient (*Beer* v. *London and Paris Hotel Co.* (1875), L. R. 20 Eq. 412).

(*b*) *Jones* v. *Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314, C. A. (resolution in minute book of company), *per* LUSH, J., at p. 324; *Welford* v. *Beazely* (1747), 3 Atk. 503; *Coles* v. *Trecothick* (1804), 9 Ves. 234.

(*c*) *Lucas* v. *James* (1849), 7 Hare, 410, at p. 419.

(*d*) *Chichester* v. *Cobb* (1866), 14 L. T. 433; *In re Blewitt* (1880), 5 P. D. 116 (where a signature by initials was decided to be sufficient under the Wills Act).

(*e*) *Bennett* v. *Brumfitt* (1867), 37 L. J. (C. P.) 25.

it is not necessary to prove that the person making the mark could not write his name at the time (*f*); and a printed heading of the name of a party is a sufficient signature by him if the document is written by his hand (*g*).

The signature of instructions for a telegram is sufficient (*h*), and a telegram itself may afford a sufficient signature, as the telegraph clerk may have the power delegated to him to sign (*i*).

Signature by agent.

778. The memorandum is sufficient if signed by a person lawfully authorised by the party to be charged (*j*).

A memorandum made and signed by a person who is agent of both parties is sufficient to bind both (*k*), as, for example, a signed entry in a broker's book is a sufficient memorandum to bind both parties (*l*), and the validity of the contract evidenced thereby is not affected by a variance in the bought and sold notes (*m*). Where there is no signed entry in the broker's book, signed bought and sold notes will constitute a memorandum if they substantially agree (*n*); but if they differ in a material respect there is no sufficient memorandum (*o*).

(*f*) *Baker* v. *Dening* (1838), 3 Ad. & El. 94.

(*g*) *Schneider* v. *Norris* (1814), 2 M. & S. 286 (bill of parcels in which the name of the seller was printed and the name of the buyer written by the seller held sufficient to charge the seller); *Tourret* v. *Cripps* (1879), 48 L. J. (CH.) 567; S. C. 27 W. R. 706, see note (*a*), p. 376, *ante* (memorandum with printed heading "From R. L. Cripps").

(*h*) *Godwin* v. *Francis* (1870), L. R. 5 C. P. 295.

(*i*) *McBlain* v. *Cross* (1871), 25 L. T. 804. If a person, being unable to write, holds the top of the pen while his daughter signs his name, it is sufficient (*Helshaw* v. *Langley* (1841), 11 L. J. (CH). 17).

(*j*) Thus, an auctioneer is the agent of both buyer and seller, and a memorandum by him is sufficient (*Simon* v. *Metivier or Motivos* (1766), 1 Wm. Bl. 599; *Beer* v. *London and Paris Hotel Co.* (1875), 20 E. 412); the auctioneer's agency exists only at the time of the sale (*Mews* v. *Carr* (1856), 1 H. & N. 484). The authority to the auctioneer as regards the buyer is given by the buyer bidding (*White* v. *Proctor* (1811), 4 Taunt. 207; *Coles* v. *Trecothick* (1804), 9 Ves. 234; *Emmerson v. Heelis* (1809), 2 Taunt. 38). And the initials of the buyer's agent written by the auctioneer in the catalogue, coupled with a letter from the buyer recognising and approving the purchase, is a sufficient memorandum (*Phillimore* v. *Barry* (1808), 1 Camp. 513). The entry must refer to the conditions of sale (if any) (*Rishton* v. *Whatmore* (1878), 8 Ch. D. 467). But an auctioneer has no authority from the purchaser to sign a contract of a different date from that of the sale (*Van Praagh* v. *Everidge*, [1903] 1 Ch. 434, C. A.). A letter written by an agent within the scope of his authority recognising and insisting on the terms contained in an unsigned contract is a sufficient memorandum (*John Griffiths Cycle Corporation, Ltd.* v. *Humber & Co., Ltd.*, [1899] 2 Q. B. 414, C. A.; reversed on another point in H. L., [1902] W. N. 9).

(*k*) *Heyman* v. *Neale* (1809), 2 Camp. 337; *Thompson* v. *Gardiner* (1876), 1 C. P. D. 777; *Sievewright* v. *Archibald* (1851), 17 Q. B. 103. In a sale of goods a broker is considered the agent of both parties for the purpose of signing the bought and sold notes, though primarily employed by the seller (*Rucker* v. *Cammeyer* (1794), 1 Esp. 105). It is a question of custom whether the broker's book can be produced to contradict the bought note (*Hawes* v. *Forster* (1834), 1 Mood. & R. 368).

(*l*) See note (*k*), *supra*.

(*m*) *Sievewright* v. *Archibald*, *supra*; *Goom* v. *Aflalo* (1826), 6 B. & C. 117; *Kempson* v. *Boyle* (1865), 3 H. & C. 763; *Townend* v. *Drakeford* (1843), 1 Car. & Kir. 20.

(*n*) *Thompson* v. *Gardiner*, *supra*; *Sievewright* v. *Archibald*, *supra*.

(*o*) *Grant* v. *Fletcher* (1826), 5 B. & C. 436; *Gregson* v. *Ruck* (1843), 4 Q. B.

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Letter to agent.

A letter from one party to the agent of the other party may bind the former, and parol evidence is admissible to show that the agent was not the principal in the transaction, and also to show who was the principal (*p*).

Authority to sign.

779. It may be proved by parol evidence that a person who signs a memorandum is an agent for a third party (*q*) in order to charge such third party but not to discharge the party who signed. But the agent in order to bind his principal must be expressly or impliedly authorised to make the memorandum (*r*). An agent who is authorised to enter into a contract has implied authority to sign a memorandum thereof (*s*). But not a house or estate agent who is merely employed to find a purchaser or tenant (*t*). The authority of an agent to sign a memorandum may be revoked at any time before it has been executed, even after the terms of the contract have been agreed upon (*u*).

737 ; *Cowie* v. *Remfry* (1846), 5 Moo. P. C. C. 232; *Sievewright* v. *Archibald* (1851), 17 Q. B. 103; *Fisenden* v. *Levy* (1863), 11 W. R. 259 ; and see *Thornton* v. *Meux* (1827), Mood. & M. 43.

(*p*) *Bateman* v. *Phillips* (1812), 15 East, 272. A defendant who has signed his own name to an agreement on the face of which he appears to be personally a contracting party cannot avoid his personal liability by proving that he signed as agent for a third party and that the plaintiff was aware of that fact at the time the agreement was made and signed (*Higgins* v. *Senior* (1841), 8 M. & W. 834).

(*q*) *Wilson* v. *Hart* (1817), 7 Taunt. 295.

(*r*) The signature by the chairman or manager of a company to the minute book may be sufficient to bind the company (*Jones* v. *Victoria Dock Co.* (1877), 2 Q. B. D. 314). A letter from the defendant's solicitors to the plaintiff's solicitor stating that the defendant had informed them that he had arranged with the plaintiff for the sale of a property at a certain price, and sending draft contract for perusal and approval, was held not a memorandum, it not having been proved that the solicitors were duly authorised to make such a memorandum (*Smith* v. *Webster* (1876), 3 Ch. D. 49, C. A.; *Donnison* v. *People's Café Co.* (1881), 45 L. T. 187). But, of course, a contract may be signed by solicitors duly authorised (*Jolliffe* v. *Blumberg* (1870), 18 W. R. 784). See also *Bowen* v. *D'Orléans (Duc)* (1900), 16 T. L. R. 226, C. A. (solicitors employed to settle contract and have it stamped, have no implied authority to sign for the purposes of the statute). See 1 Smith, L. C., 11th ed., 334—335). Where a buyer of goods at a sale by auction had previously agreed with the seller that he should be entitled to set off the price of any goods he might buy against a debt due to him from the seller, it was held that the auctioneer had no authority to sign a memorandum on behalf of the buyer providing for payment in cash (*Bartlett* v. *Purnell* (1836), 4 Ad. & El. 792). See also *John Griffiths Cycle Corporation, Ltd.* v. *Humber & Co., Ltd.*, [1899] 2 Q. B. 414, C. A., as reported at 81 L. T. 310; this case was reversed in H. L., but on another point, [1902] W. N. 9.

(*s*) *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267 ; *Durrell* v. *Evans* (1862), 1 H. & C. 174, Ex. Ch. Where the plaintiff's traveller, on taking an order from the defendant, wrote down in his presence the defendant's name and the description and price of the goods and gave the defendant a copy of what he had written, it was held, distinguishing *Durrell* v. *Evans*, *supra*, that there was no evidence of signature by an agent within the statute (*Murphy* v. *Boese* (1875), L. R. 10 Exch. 126).

(*t*) *Vale of Neath Colliery Co.* v. *Furness* (1876), 45 L. J. (CH.) 276 ; *Chadburn* v. *Moore* (1892), 61 L. J. (CH.) 674; *Hamner* v. *Sharp* (1874), L. R. 19 Eq. 108. Compare *Rosenbaum* v. *Belson*, *supra*.

(*u*) *Farmer* v. *Robinson* (1805), 2 Camp. 338, n. (broker); *Warwick* v. *Slade* (1811), 3 Camp. 127. *Quære*, however, whether a bidder at a sale by auction can revoke the auctioneer's authority to sign for him after the lot has been knocked down to him (*Bell* v. *Balls*, [1897] 1 Ch. 663).

The signature of an agent may bind his principal though the agent signs only in the character of witness (*v*).

Agent must be third person.

780. The agent must be a third person: a memorandum cannot be signed by one of the parties to the contract as agent for the other so as to satisfy the requirements of the statute (*w*).

Delegation.

781. An agent cannot without the consent of his principal delegate his authority to sign a memorandum (*x*), but if it is signed by the delegate in the presence of the principal and without objection by him, that is, as a general rule, sufficient evidence of his consent (*y*).

Parol authority.

782. Since an agent may be lawfully authorised by parol to sign an agreement for the purchase or sale of land on behalf of the party to be charged (*a*), it follows that, where an agent for the purchaser appointed by parol purchases in his own name, parol evidence may be given to show that the real purchaser was not the person named in the contract, and the contract may be enforced by the principal against both the agent so appointed and the vendor (*b*); nor can parol evidence be resisted on the ground that creations of trusts in land must be proved by writing (*c*), because it would be inequitable in such a case for the agent to set up the statute (*d*).

(3) *Part Performance.*

Application of equitable doctrine of part performance.

783. The fact that a contract has been partly performed does not at law affect the right of the defendant in an action on the contract to set up that there is no memorandum in writing signed

(*v*) *Wallace* v. *Roe*, [1903] 1 I. R. 32.

(*w*) *Wright* v. *Dannah* (1809), 2 Camp. 203; *Sharman* v. *Brandt* (1871), L. R. 6 Q. B. 720, Ex. Ch. Thus an auctioneer cannot sue on a memorandum signed by himself (*Farebrother* v. *Simmons* (1822), 5 B. & Ald. 333). But he can sue on a memorandum made by his clerk if the purchaser assent to the clerk making the memorandum (*Bird* v. *Boulter* (1833), 4 B. & Ad. 443). Where the agent of the plaintiff, but not of the defendant, at the request of the defendant wrote a note of the contract in the defendant's book, which the agent signed with his own name, it was held there was no memorandum (*Graham* v. *Musson* (1839), 5 Bing. (N. C.) 603). See also *Beer* v. *London and Paris Hotel Co.* (1875), L. R. 20 Eq. 412, at p. 416; *Mews* v. *Carr* (1856), 1 H. & N. 484.

(*x*) *Henderson* v. *Barnewall* (1827), 1 Y. & J. 387; *Blore* v. *Sutton* (1817), 3 Mer. 237. Thus, a signature by an auctioneer's clerk will not bind the vendor (*Bell* v. *Balls*, [1897] 1 Ch. 663; *Gosbell* v. *Archer* (1835), 2 Ad. & El. 500), unless he assents to the clerk so signing (*Coles* v. *Trecothick* (1804), 9 Ves. 234; see also *Dyas* v. *Stafford* (1881), 7 L. R. Ir. 590). It is a sufficient signature if the purchaser gives in his name and address to the auctioneer's clerk and stands by while the clerk fills in his name and address in the memorandum as follows: "I A. B. of etc.," the memorandum not being otherwise signed by the defendant (*Sims* v. *Landray*, [1894] 2 Ch. 318). And a memorandum made without authority may be ratified (*Maclean* v. *Dunn* (1828), 4 Bing. 722), and such ratification may be verbal or by conduct (*Soames* v. *Spencer* (1822), 1 Dow. & Ry. (K. B.) 32).

(*y*) *Bird* v. *Boulter* (1833), 4 B. & Ad. 443; *Sims* v. *Landray*, *supra*.

(*a*) Statute of Frauds (29 Car. 2, c. 3), s. 4; this section must be distinguished from s. 1, which requires an agent for the purposes therein named to be appointed by writing.

(*b*) *Cave* v. *Mackenzie* (1877), 46 L. J. (CH.) 564; *Heard* v. *Pilley* (1869), 4 Ch. App. 548.

(*c*) Statute of Frauds (29 Car. 2, c. 3), s. 7.

(*d*) *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, C. A.; *Heard* v. *Pilley*, *supra*.

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by him, as required by the Statute of Frauds (*e*). But in equity, in certain cases, a defendant will not be permitted to set up the statute after a part performance by the plaintiff.

Whether the equitable doctrine of part performance of a parol agreement, which enables proof of it to be given notwithstanding the provisions of the statute, is confined to contracts for the sale or purchase of land, or for the acquisition of an interest in land, or applies to all cases in which a court of equity would entertain a suit for specific performance if the alleged contract had been in writing, is a question with regard to which there is a conflict of authority (*f*). On principle, there seems to be no reason why it should be confined to contracts relating to land. The most obvious case of part performance is where the defendant is in possession of land of the plaintiff under the parol agreement; and the reason for the rule by which he is precluded from taking advantage of the want of writing is that where the defendant has stood by and allowed the plaintiff to fulfil his part of the contract, it would be fraudulent to set up the statute. But this reason equally applies wherever the defendant has obtained and is in possession of some substantial advantage under a parol agreement which, if in writing, would be such as the court would direct to be specifically performed. It is clear that the doctrine is confined to contracts falling within the jurisdiction to decree specific performance and has no application to contracts of service extending over a period of more than a year (*g*), or to contracts of guarantee (*h*).

784. The part performance, in order to take the case out of the operation of the statute, must be by the person seeking to enforce the parol agreement (*i*).

Contracts in consideration of marriage.

785. The doctrine of part performance has been applied in many cases of parol agreements to settle land made upon consideration

(*e*) See *Boydell* v. *Drummond* (1809), 11 East, 142.

(*f*) In *McManus* v. *Cooke* (1887), 35 Ch. D. 681, where it was held that the doctrine applied to a parol agreement for the acquisition by each party of an easement over the other's land, KAY, J., at p. 697, expressed the opinion that the principle was not confined to contracts relating to land; and in *Crowley* v. *O'Sullivan*, [1900] 2 I. R. 478, the principle was applied in the case of an agreement for a partnership for a term of years. See the observations of Lord COTTENHAM in *Hammersley* v. *De Biel* (1845), 12 Cl. & Fin. 45, 64, n.; see also *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551, at p. 572. In the earlier case of *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123, C. A., the Court of Appeal (BRETT, COTTON, and THESIGER, L.JJ.) unanimously expressed the opinion that the doctrine is confined to contracts for the sale of interests in land, and this view is to some extent supported by the judgments of the Lords in *Maddison* v. *Alderson* (1883), 8 App. Cas. 467, though Lord SELBORNE, at p. 474, pointed out that that view seemed to differ from the opinion of Lord COTTENHAM in *Hammersley* v. *De Biel*, *supra*.

(*g*) *Britain* v. *Rossiter*, *supra*; *Maddison* v. *Alderson*, *supra*. And see title SPECIFIC PERFORMANCE.

(*h*) *Wain* v. *Warlters* (1804), 5 East, 10. With regard to contracts for the sale of goods, the acts of part performance which do away with the necessity for writing are specified by the statute (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4). See title SALE OF GOODS.

(*i*) *Caton* v. *Caton* (1866), 1 Ch. App. 137, *per* Lord CRANWORTH, L.C., at p. 148, considered in *Dickinson* v. *Barrow*, [1904] 2 Ch. 339.

of marriage (*j*), and although marriage itself is not considered a sufficient act of part performance to prevent the statutory defence from being set up (*k*), other acts of part performance, such as giving up possession in execution of the agreement, will be sufficient (*j*).

Basis of doctrine.

786. The doctrine of part performance, as we have seen, is based on the theory that it would be fraudulent in the cases to which it applies to set up the statute, and it is a general principle of equity not to permit the Statute of Frauds to be used by a defendant to cover a fraudulent act where he is in the position of a trustee or *quasi*-trustee towards the plaintiff (*l*).

(4) *Executed Contracts.*

Within the statute.

787. A contract, though executed on the part of the plaintiff, but unexecuted on the part of the defendant, is still to be considered as a contract within the Statute of Frauds, and the defendant is not precluded by the fact of execution by the plaintiff from setting up the want of writing in any action on the express contract (*m*).

But if the contract has been executed by the plaintiff, and anything has been done by the defendant upon the doing of which the law would imply a promise to pay, the plaintiff can recover on such implied promise notwithstanding the statute (*n*).

Quantum meruit.

Thus, where goods are sold and delivered to the defendant, or work is done at the request of the defendant and of which he has had the benefit, the plaintiff can recover on a *quantum meruit*, notwithstanding that the respective contracts were within the statute (*o*).

Services rendered

788. But, though a plaintiff may recover on a *quantum meruit* for services actually rendered under an unenforceable contract, he

(*j*) *Surcome* v. *Pinniger* (1853), 3 De G. M. & G. 571, C. A.; *Thomson* v. *Thomson* (1840), 12 Cl. & Fin. 61, n.; and see *Ungley* v. *Ungley* (1877), 5 Ch. D. 887, C. A.; *Sharman* v. *Sharman* (1892), 67 L. T. 834, C. A.; *Johnstone* v. *Mappin* (1891), 64 L. T. 48. See for further details, title SETTLEMENTS. As to what constitutes part performance in the case of contracts for the sale or purchase of land, or for the acquisition of an interest in land, see titles SALE OF LAND; LANDLORD AND TENANT.

(*k*) *Caton* v. *Caton* (1866), 1 Ch. App. 137; *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551; *Thynne* (*Lady E.*) v. *Glengall* (*Earl*) (1848), 2 H. L. Cas. 131.

(*l*) *Maxwell* (*Sir G.*) v. *Mountacute* (*Lady*) (1719), Prec. Ch. 526; *Wood* v. *Midgley* (1854), 5 De G. M. & G. 41, C. A.; *Lincoln* v. *Wright* (1859), 4 De G. & J. 16, C. A.; *Haigh* v. *Kaye* (1872), 7 Ch. App. 469 (in which case it was held that the defendant was a trustee for the plaintiff); *Re Marlborough* (*Duke*), *Davis* v. *Whitehead*, [1894] 2 Ch. 133 (a similar case to *Haigh* v. *Kaye*, *supra*, in which STIRLING, J., declined to follow *Leman* v. *Whitley* (1828), 4 Russ. 423, which appears to limit the principle); *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, C. A.; *Isaacs* v. *Evans*, [1899] W. N. 261; *Caddick* v. *Skinmore* (1857), 2 De G. & J. 52; and see title MISREPRESENTATION AND FRAUD.

(*m*) *Cocking* v. *Ward* (1845), 1 C. B. 858, *per* TINDAL, C.J., at p. 868; *Kelly* v. *Webster* (1852), 12 C. B. 283; *Sanderson* v. *Graves* (1875), L. R. 10 Exch. 234; *Boydell* v. *Drummond* (1809), 11 East, 142.

(*n*) *Sanderson* v. *Graves*, *supra*. See judgment of BRAMWELL, B., at p. 238 Account stated (*Knowles* v. *Michel* (1811), 13 East, 249; *Laycock* v. *Pickles* (1863), 33 L. J. (Q. B.) 43).

(*o*) *Mavor* v. *Payne* (1825), 3 Bing. 285; *Savage* v. *Canning* (1867), 1 I. R. C. L. 434; *Scarisbrook* v. *Parkinson* (1869), 17 W. R. 467; *Knowlman* v. *Bluett* (1874), L. R. 9 Exch. 307, Ex. Ch.; *Sanderson* v. *Graves*, *supra*; *Pulbrook* v. *Laws* (1876), 1 Q. B. D. 284.

SECT. 3. Form of the Contract.

cannot set up an implied contract attended with the same consequences as the original contract, so as to escape the effect of the statute, or rely on the acts done under the unenforceable contract as evidence of an implied contract of service to be determined only by reasonable notice (*p*).

Money received.

Money received by the defendant on behalf of the plaintiff can be recovered by the latter as money received to his use, notwithstanding that the contract between the plaintiff and defendant is within the Statute of Frauds (*q*).

Money paid.

789. Where money has been expended by the plaintiff under a contract which cannot be enforced owing to the Statute of Frauds, the statute does not preclude him from recovering the amount in an action for money paid at the defendant's request (*r*). But money paid under such a contract cannot be recovered back as upon a failure of consideration (*s*).

Account stated.

790. If the contract has been executed by the plaintiff and the defendant admits that he owes the money under it, the plaintiff can recover on a claim upon an account stated (*t*).

Accord and satisfaction.

791. The fact that an agreement which could not have been enforced owing to the Statute of Frauds has been performed by the defendant, and that such performance has been accepted by the plaintiff in satisfaction of a debt or other obligation, may be pleaded by the defendant as an answer to the plaintiff's claim in an action to enforce such debt or obligation (*a*).

(5) *Contracts partly within the Statute of Frauds.*

Entire and divisible contracts.

792. Where a promise is entire, and is partly within and partly not within the statute, the whole contract is unenforceable unless the requirements of the statute are complied with (*b*); but if the

(*p*) Therefore, where a verbal contract of service for a year has been made commencing from a future date, a new contract of service will not be implied from the fact that the plaintiff has entered into the service so as to entitle him to damages for wrongful dismissal, the former contract, although unenforceable, being still in existence (*Britain* v. *Rossiter* (1879), 11 Q. B. D. 123, C. A.).

(*q*) *Griffith* v. *Young* (1810), 12 East, 513. See p. 473, *post*; *Green* v. *Saddington* (1857), 7 E. & B. 503.

(*r*) *Knowlman* v. *Bluett* (1874), L. R. 9 Exch. 307, Ex. Ch. See *Gosbell* v. *Archer* (1835), 2 Ad. & El. 500. A plaintiff who pays money to a third person under a guarantee unenforceable on account of the Statute of Frauds can recover it from the defendant as money paid at his request (*Alexander* v. *Vane* (1836), 1 M. & W. 511). See p. 465, *post*.

(*s*) *Sweet* v. *Lee* (1841), 3 Man. & G. 452; *Thomas* v. *Brown* (1876), 1 Q. B. D. 714.

(*t*) *Cocking* v. *Ward* (1845), 1 C. B. 858; *Seago* v. *Deane* (1828), 4 Bing. 459; see *Teal* v. *Auty* (1820), 2 Brod. & Bing. 99. See p. 489, *post*.

(*a*) *Lavery* v. *Turley* (1860), 6 H. & N. 239.

(*b*) *Thomas* v. *Williams* (1830), 10 B. & C. 664, where the plaintiff, a landlord, went on the day of the sale by the defendant, an auctioneer, to distrain for rent, and the defendant promised, if he would not distrain, to pay the rent due and the rent for the next quarter, and it was held that the whole contract was unenforceable, because the contract to pay the future rent was within the statute; *Mechelen* v. *Wallace* (1837), 7 Ad. & El. 49; *Harman* v. *Reeve* (1856), 18 C. B. 587; *Vaughan* v. *Hancock* (1846), 3 C. B. 766; *Falmouth* (*Earl*) v. *Thomas* (1832), 1 Cr. & M. 89; *Chater* v. *Beckett* (1797), 7 Term Rep. 201; *Savage* v. *Canning* (1867), 1 I. R. C. L. 434.

promise is divisible, so that in effect there are two distinct agreements, one of which is and the other is not within the statute, the portion of the promise which is not within the statute may be enforced though there is no evidence in writing (*c*). So where there is a verbal collateral agreement not contradicting the terms of a written agreement the fact that the written agreement is within the statute does not prevent the collateral agreement from being enforced without written evidence (*d*).

SECT. 4.—*Consideration.*

Nudum pactum.

793. Valuable consideration is always essential to the validity of a simple contract, and any promise, whether verbal or written, which is not under seal and is made without such consideration amounts merely to *nudum pactum, ex quo non oritur actio* (*e*). In the case of a contract which is divisible into two parts, for only one of which there is valuable consideration, that part only can be enforced (*f*).

Definition.

794. Valuable consideration has been defined as some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other at his request (*g*). It is not necessary that the promisor should benefit by the consideration. It is sufficient if the promisee does some act from which a third person benefits, and which he would not have done but for the promise (*h*).

(*c*) *Mayfield* v. *Wadsley* (1824), 3 B. & C. 357; *Wood* v. *Benson* (1831), 2 Cr. & J. 94.

(*d*) *Erskine* v. *Adeane* (1873), 8 Ch. App. 756, ; *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215, C. A.; *Angell* v. *Duke* (1875), L. R. 10 Q. B. 174; *Boston* v. *Boston*, [1904] 1 K. B. 124, C. A.

(*e*) *Rann* v. *Hughes* (1778), 7 Term Rep. 350, note (a), H. L., overruling *Pillans* v. *Van Mierop* (1765), 3 Burr. 1663; *Davis* v. *Dodd* (1812), 4 Taunt. 602 (promise to pay amount of lost bill of exchange); *Williams* v. *Stern* (1879), 5 Q. B. D. 409, C. A. (promise to give time for payment of instalment under bill of sale); *Haigh* v. *Brooks* (1839), 10 Ad. & El. 309, Ex. Ch. (guarantee for past debt). An apparent exception to the rule that a simple contract is not binding without valuable consideration is to be found in the case of the acceptance of a bill of exchange which is drawn in favour of a third person. In that case the acceptor becomes liable to the third person, provided he is a holder for value, and to any other person becoming a holder for value, although the acceptor did not receive any consideration for his acceptance. A person who signs a bill of exchange without consideration is, however, only liable to holders for value, and not to the person for whose accommodation he signed, so that it is not really an exception to the rule. In the case of bills of exchange and promissory notes valuable consideration is presumed until the contrary is proved. See title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 461.

(*f*) *Wood* v. *Benson* (1831), 2 Cr. & J. 94.

(*g*) *Currie* v. *Misa* (1875), L. R. 10 Exch. 153, Ex. Ch., at p. 162; *Fleming* v. *Bank of New Zealand*, [1900] A. C. 577, P. C., at p. 586. And see *Edgware Highway Board* v. *Harrow District Gas Co.* (1874), 44 L. J. (Q. B.) 1; *Williamson* v. *Clements* (1809), 1 Taunt. 523. If the consideration is illegal or immoral, the contract is void; see *Shackell* v. *Rosier* (1836), 2 Bing. (N. C.) 634, and p. 391, *post*.

(*h*) *Bailey* v. *Croft* (1812), 4 Taunt. 611 (agreement by A. with B. in consideration that C., who was not interested, would join as a party); *Alhusen* v. *Prest* (1851), 6 Exch. 720 (withdrawal of proceedings against A. in consideration of B. promising to pay A.'s debt); *Haigh* v. *Brooks* (1839), 10 Ad. & El. 309, Ex. Ch. (guarantee).

SECT. 4. **Consideration.**

Must move from promisee.

795. The consideration must move from the promisee, that is to say, it must be his act, forbearance, or promise, as the case may be, and it must be given by him as an equivalent for the promise made by the other party to the contract (*i*).

Executed or executory.

796. Consideration is said to be executed when it consists in some act or forbearance on the part of the promisee completed at the time when the promise is made; when it consists in a promise on his part to do or forbear from doing some act in the future, it is called executory.

Adequacy.

797. An act or forbearance which constitutes the consideration for a promise must be of some value in the eye of the law, but need not be an adequate return for the promise (*k*). The court will not inquire into the adequacy of the consideration, but will leave the parties to make the bargain for themselves (*l*). This rule, generally speaking, applies in equity as well as at law (*l*). A

(*i*) *Thomas* v. *Thomas* (1842), 2 Q. B. 851; see also *Evans* v. *Hooper* (1875), 1 Q. B. D. 45, C. A.; *Dashwood* v. *Jermyn* (1879), 12 Ch. D. 776 (followed in *Ashwell and Nesbit, Ltd.* v. *Stanton* (1900), 16 T. L. R. 399); *Watt* v. *Callard* (1908), *Times*, November 27; *Osborne* v. *Rogers* (1667), 1 Wms. Saund. 264; *Price* v. *Easton* (1833), 4 B. & Ad. 433; *Barry* v. *Barry* (1891), 28 L. R. Ir. 45; and see *McGruther* v. *Pitcher*, [1904] 2 Ch. 306, C. A., at p. 308; *Tipper* v. *Bicknell* (1837), 3 Bing. (N. C.) 710, and *Webb* v. *Rhodes* (1837), 3 Bing. (N. C.) 732. Where the consideration moves from two persons it is not necessary that both should be joined as plaintiffs in an action brought to enforce a promise made to one of them (*Jones* v. *Robinson* (1847), 1 Exch. 454). For certain exceptional cases in which a person who is not a party to the consideration can sue on the contract, see p. 342, *ante*.

(*k*) *Thomas* v. *Thomas*, *supra*. The following cases may be referred to by way of illustration:—In *Bainbridge* v. *Firmstone* (1838), 8 Ad. & El. 743, permission given by the plaintiff to the defendant at his request to weigh two boilers belonging to the plaintiff was held to constitute valuable consideration for the defendant's promise to return the boilers in as good condition as they were in at the time when the permission was given. In *Haigh* v. *Brooks* (1839), 10 Ad. & El. 309, Ex. Ch., the consideration for the defendant's promise consisted in the plaintiffs giving up a guarantee which was held by them. The defendant was held not to be justified in breaking his promise by discovering subsequently that the document did not possess the value which he supposed at the time when his promise was given. In *Smith* v. *Smith* (1863), 13 C. B. (N. S.) 418, a promise by the plaintiff to give up possession of a will under which she was a beneficiary was held sufficient consideration for a promissory note given by the defendant to secure payment of her legacy, although the validity of the will was questioned and an arrangement was subsequently made between all parties interested on the basis that the will was invalid. In *Begbie* v. *Phosphate Sewage Co.* (1875), L. R. 10 Q. B. 491; affirmed (1876) 1 Q. B. D. 679, C. A., the plaintiff agreed to purchase the exclusive right of using the defendants' patent in Berlin, knowing that no such right existed, but intending to obtain an ostensible grant with a view to the formation of a company. It was held that, as he in fact got that for which he was willing to part with his money, there was no failure of consideration. In *Pavy* v. *Smith* (1901), 17 T. L. R. 471, it was held that where a promise was made in consideration of the plaintiff "revealing" particulars of a sum of money to which the defendant was entitled, the word "revealing" imported a disclosure of something not already known to the defendant, and that, the plaintiff not having given any information of which the defendant was not previously aware, the consideration wholly failed. A promise to pay a gambling debt is void for want of consideration; but an agreement on the part of the creditor to forbear from posting the debtor as a defaulter is sufficient consideration for a fresh promise to pay the amount of the debt (*Hyams* v. *Stuart King*, [1908] 2 K. B. 696, C. A.; and see *Bubb* v. *Yelverton* and other cases cited in the notes on pp. 398 *et seq.*, *post*).

(*l*) *Haigh* v. *Brooks* (1839), 10 Ad. & El. 309, Ex. Ch.; *Kearns* v. *Durell* (1848),

merely nominal consideration does not, however, prevent a contract or settlement from being regarded as voluntary so far as third persons are concerned (*m*).

Impossibility.

798. A promise to do an act which is obviously impossible, or which has no legal effect, is no consideration (*n*); nor is a promise which does not involve any legal obligation (*o*), nor a promise to perform, or the actual performance of something which the promisee is legally bound to perform independently of his promise (*p*), or is already under a legal obligation to the promisor to perform (*q*). The fact, however, that the promisee is already under a legal liability to some third person to perform the act does not prevent his promise to perform it at the request of the promisor from constituting a valid consideration (*r*). An existing debt forms a sufficient consideration for a negotiable security given by the debtor

Existing obligation.

6 C. B. 596; *Pilkington* v. *Scott* (1846), 15 M. & W. 657, *per* ALDERSON, B., at p. 660; *Bolton* v. *Madden* (1873), L. R. 9 Q. B. 55; *Gravely* v. *Barnard* (1874), L. R. 18 Eq. 518; *Middleton* v. *Brown* (1878), 47 L. J. (CH.) 411, C. A.; *Harrison* v. *Guest* (1855), 6 De G. M. & G. 424. The inadequacy, however, though not in any case a defence *per se*, may be so great as to raise a presumption of fraud or undue influence in cases where there are other circumstances indicating fraud or where a fiduciary relationship exists between the parties, or one is in fact under the influence of the other; see *Coles* v. *Trecothick* (1804), 9 Ves. 234, at p. 246; *Wood* v. *Abrey* (1818), 3 Madd. 417, at p. 423; and as to undue influence, see p. 357, *ante*. Inadequacy of consideration may be a ground for refusing specific performance where it appears that the parties did not bargain with equal knowledge of the facts (*Falcke* v. *Gray* (1859), 4 Drew. 651; see title SPECIFIC PERFORMANCE).

(*m*) *Kelson* v. *Kelson* (1853), 10 Hare, 385; *Gully* v. *Exeter* (*Bishop*) (1830), 10 B. & C. 584. See title FRAUDULENT AND VOIDABLE CONVEYANCES.

(*n*) *Kent* v. *Pratt* (1610), 1 Brownl. 6; *Harvey* v. *Gibbons* (1676), 2 Lev. 161; *Kaye* v. *Dutton* (1844), 7 Man. & G. 807. As to promises which are too vague or uncertain to form a consideration, see p. 331, *ante*.

(*o*) *Westhead* v. *Spronson* (1861), 6 H. & N. 728 (a promise by A., at B.'s request, to supply such goods to C. as he may require, and A. may see fit to supply, is no consideration for a promise by B., because it binds A. to nothing).

(*p*) *Bridge* v. *Cage* (1605), Cro. Jac. 103; *Orme* v. *Galloway* (1854), 9 Exch. 544 (promise to pay interest on debt in respect of which interest was payable by law); *Collins* v. *Godefroy* (1831), 1 B. & Ad. 950 (attendance of witness on subpœna); *Crowhurst* v. *Laverack* (1852), 8 Exch. 208 (agreement by mother to support her illegitimate children). Compare *Smith* v. *Roche* (1859), 6 C. B. (N. S.) 223; *Jennings* v. *Brown* (1842), 9 M. & W. 496; *England* v. *Davidson* (1840), 11 Ad. & El. 856; *Neville* v. *Kelly* (1862), 12 C. B. (N. S.) 740; *Mortimore* v. *Wright* (1840), 6 M. & W. 482; *Bazeley* v. *Forder* (1868), L. R. 3 Q. B. 559; *Knowlman* v. *Bluett* (1874), L. R. 9 Exch. 307; *Seaborne* v. *Maddy* (1840), 9 C. & P. 497.

(*q*) *Dixon* v. *Adams* (1596), Cro. Eliz. 538; *Stilk* v. *Myrick* (1809), 2 Camp. 317; *Bayley* v. *Homan* (1837), 3 Bing. (N. C.) 915 (promise by lessee to repair by certain day no consideration for promise by lessor to forbear from suing for breach of covenant to repair); *Morton* v. *Burn* (1837), 7 Ad. & El. 19; *Cowper* v. *Green* (1841), 7 M. & W. 633; *Jackson* v. *Cobbin* (1841), 8 M. & W. 790. For this reason a promise by the master to pay seamen increased wages in consideration of their continuing to serve, or doing more than the ordinary share of work, when they are under a legal obligation to do so, is *nudum pactum* (*Harris* v. *Watson* (1791), 1 Peake, 102; *Harris* v. *Carter* (1854), 3 E. & B. 559; *Frazer* v. *Hatton* (1857), 2 C. B. (N. S.) 512). Otherwise, if the seamen are justified in refusing to proceed on the voyage (*Hartley* v. *Ponsonby* (1857), 7 E. & B. 872).

(*r*) *King* v. *Sears* (1835), 2 Cr. M. & R. 48; *Shadwell* v. *Shadwell* (1860), 9 C. B. (N. S.) 159; *Scotson* v. *Pegg* (1861), 6 H. & N. 295.

SECT. 4. Consideration.

to the creditor on account of the debt, even if the security is payable on demand (*s*).

Moral obligation.

799. But a mere motive, such as the moral obligation to repay a benefit already received (*t*), or to make provision for a mistress seduced by the promisor on an agreement to sever the connection and live apart (*u*), or the desire of an executor to carry out the wishes of his testator (*t*), is not valuable consideration; nor is natural love and affection arising from blood relationship between the parties (*v*).

Forbearance to sue.

800. Forbearance to sue, even though no definite time is allowed, is valuable consideration for a promise, provided that the promisee has reasonable ground for believing that he has a good cause of action (*w*). If, however, it does not appear that there was any right which could be enforced either at law or in equity, a mere forbearance to sue does not of itself constitute a valuable consideration (*x*).

Forbearance to sue a third person at the request of the promisor is a sufficient consideration for his promise (*y*).

(*s*) *Currie* v. *Misa* (1875), L. R. 10 Exch. 153, Ex. Ch.; affirmed on another ground *sub nom. Misa* v. *Currie* (1876), 1 App. Cas. 554; *Stott* v. *Fairlamb* (1883), 53 L. J. (Q. B.) 47, C. A. In such a case the negotiable security is equivalent to a conditional payment of the debt; see p. 447, *post*. Where goods have been paid for by a negotiable instrument which is still running, there is valuable consideration for a subsequent agreement that the negotiable instrument shall be paid out of moneys arising from the sale of the goods (*Walker* v. *Rostron* (1842), 9 M. & W. 411). It has been held that the mere existence of a debt is not consideration for the giving of a security by the debtor to secure the debt (*Wigan* v. *English and Scottish Law Life Assurance Association*, [1909] 1 Ch. 291, 297).

(*t*) *Eastwood* v. *Kenyon* (1840), 11 Ad. & El. 438; *Thomas* v. *Thomas* (1842), 2 Q. B. 851; *Wigan* v. *English and Scottish Law Life Association*, *supra*.

(*u*) *Beaumont* v. *Reeve* (1846), 8 Q. B. 483.

(*v*) *Holliday* v. *Atkinson* (1826), 5 B. & C. 501; *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393. Natural love and affection, which is sufficient to raise a use or to rebut the presumption of a resulting trust or use (see title TRUSTS AND TRUSTEES), is sometimes called "good" as distinguished from "valuable" consideration.

(*w*) *Willatts* v. *Kennedy* 1831), 8 Bing. 5; *Crowhurst* v. *Laverack* (1852), 8 Exch. 208 (forbearance by mother of illegitimate children from affiliation proceedings); *Morton* v. *Burn* (1837), 7 Ad. & El. 19; *Edwards* v. *Baugh* (1843), 11 M. & W. 641; *Wilby* v. *Elgee* (1875), L. R. 10 C. P. 497 (forbearance to sue for doubtful claim sufficient); *Alliance Bank* v. *Broom* (1864), 2 Drew. & Sm. 289; *Fullerton* v. *Provincial Bank of Ireland*, [1903] A. C. 309.

(*x*) *Tooley* v. *Windham* (1590), Cro. Eliz. 206; *Graham* v. *Johnson* (1869), L. R. 8 Eq. 36; *Edwards* v. *Baugh* (1843), 11 M. & W. 641; *Jones* v. *Ashburnham* (1804), 4 East, 455. See, however, *Hyams* v. *Stuart King*, [1908] 2 K. B. 696, C. A., and compare *Atkinson* v. *Settree* (1744), Willes, 482. See also *Sibree* v. *Tripp* (1846), 15 M. & W. 36; *Llewellyn* v. *Llewellyn* (1845), 3 Dow. & L. 318. In the case of a composition entered into between a debtor and his creditors, by which each of the creditors agrees to accept a smaller amount than is due in satisfaction of his claim, the consideration for each creditor's promise consists in the undertaking by the other creditors to forego part of their claims; see p. 443, *post*. As to whether forbearance to post a man as a defaulter is a good consideration for a promise to pay a gaming debt, see p. 397, *post*.

(*y*) *Mapes* v. *Sidney* (1624), Cro. Jac. 683; *Smith* v. *Algar* (1830), 1 B. & Ad. 603; *Balfour* v. *Sea Fire Life Assurance Co.* (1857), 3 C. B. (N. S.) 300;

Compromise.

801. A compromise of a disputed claim which is honestly made, whether legal proceedings have been instituted or not, constitutes valuable consideration, even if the claim ultimately turns out to be unfounded (*a*). It is not necessary that the question in dispute should be really doubtful. It is sufficient if the parties in good faith believe it to be so, though such belief is founded on a misapprehension of a clear rule of law (*b*). The giving up of a contingent right to the costs of proceedings which are in the discretion of the court is a sufficient consideration (*c*). Where, however, the plaintiff in an action knows that his claim is unfounded, but believes that he will succeed because of the defendant's reluctance to go into the witness-box, a compromise of the claim does not constitute valuable consideration (*d*).

Past consideration.

802. A so-called past consideration, that is, something done by the promisee before the promise was made, may constitute a motive for the promise, but is not a real consideration (*e*). There are, however, certain exceptional cases in which a promise is held to be binding although the consideration for it is a benefit which was received by the promisor before the promise was made. Thus, a person who is protected from liability on his promise by some provision of the common law or statute which is meant for his advantage, such, for instance, as the Statute of Limitations, may waive the benefit of that protection and render himself liable by making a fresh promise, although he receives no new consideration for it (*f*).

Oldershaw v. *King* (1857), 2 H. & N. 517, Ex. Ch.; *Coles* v. *Pack* (1869), L. R. 5 C. P. 65; *Alhusen* v. *Prest* (1851), 6 Exch. 720; *Harris* v. *Venables* (1872), 41 L. J. (EX.) 180; *Crears* v. *Hunter* (1887), 19 Q. B. D. 341, C. A.

(*a*) *Wade* v. *Simeon* (1846), 2 C. B. 548; *Crowther* v. *Farrer* (1850), 15 Q. B. 677; *Cook* v. *Wright* (1861), 1 B. & S. 559; *Callisher* v. *Bischoffsheim* (1870), L. R. 5 Q. B. 449; *Ockford* v. *Barelli* (1871), 20 W. R. 116; *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, C. A.; *Kingsford* v. *Oxenden* (1891), 55 J. P. 789, C. A.; *Holsworthy Urban District Council* v. *Holsworthy Rural District Council*, [1907] 2 Ch. 62.

(*b*) *Lucy's Case* (1853), 4 De G. M. & G. 356, C. A.

(*c*) *Bracewell* v. *Williams* (1866), L. R. 2 C. P. 196.

(*d*) *Re Blythe, Ex parte Banner* (1881), 17 Ch. D. 480, C. A. And see *Edwards* v. *Baugh* (1843), 11 M. & W. 641.

(*e*) *Lampleigh* v. *Brathwait* (1615), Hob. 105; 1 Smith, L. C., 11th ed., 141; *Roscorla* v. *Thomas* (1842), 3 Q. B. 234; *Eastwood* v. *Kenyon* (1840), 11 Ad. & El. 438; *Wigan* v. *English and Scottish Law Life Association*, [1909] 1 Ch. 291 (existing debt not valuable consideration for assignment of life policy). Compare *Littlefield* v. *Shee* (1831), 2 B. & Ad. 811.

(*f*) *Wennall* v. *Adney* (1802), 3 Bos. & P. 247, note (a); *Earle* v. *Oliver* (1848), 2 Exch. 71, *per* PARKE, B., at p. 90; *Latouche* v. *Latouche* (1865), 3 H. & C. 576. Thus, a married woman, who had made a promise which in the then state of the law was not enforceable against her owing to her incapacity to contract, was held liable on a subsequent promise to the same effect made after she had become a widow (*Lee* v. *Muggeridge* (1813), 5 Taunt. 36). A person who gave bills by way of security for money borrowed at usurious interest at a time when the usury laws were in force, and renewed the bills after the repeal of those laws, was held liable on the bills although he received no fresh consideration for renewing them (*Flight* v. *Reed* (1863), 1 H. & C. 703). This doctrine has no longer any application in the case of a promise made by a bankrupt who has obtained his discharge to pay a debt from which he has been released by

SECT. 4. Consideration.

Services rendered.

Where services have been rendered by one person to another at his request, a subsequent promise to pay for the services can be enforced (*g*). This is, perhaps, not a real exception to the rule stated above, for in such a case there may be an implied promise to pay for the service, and the subsequent express promise may be treated either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration on the faith of which the service was originally rendered (*h*).

Medical attendance to pauper.

In certain cases it has been held that where a pauper resides in a parish other than the place of his legal settlement, the poor law authority of the latter place, who are under a legal obligation to provide such medical attendance as he may require, are liable to recoup to the poor law authority of the parish in which he resides the expense of medical attendance voluntarily provided by them for the pauper (*i*), even if there was no subsequent promise by the first-named authority to repay such expense (*k*). Here again the liability rests upon a request to provide the necessary attendance and a promise to pay for such attendance, both of which are to be implied from the conduct of the parties (*l*).

Marriage.

803. Marriage is a valuable consideration sufficient to support not only ante-nuptial promises by the parties thereto, but also by third persons (*m*). In the case of contracts to marry, the promise

proceedings in bankruptcy. An order of discharge releases the bankrupt from all debts provable in bankruptcy with certain specified exceptions (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 30); and a promise to pay a debt which has been released by the discharge is not binding on the bankrupt unless it is made for new consideration (*Heather* v. *Webb* (1876), 2 C. P. D. 1; *Jakeman* v. *Cook* (1878), 4 Ex. D. 26; *Re Andrews, Ex parte Barrow* (1881), 18 Ch. D. 464, C. A.). A debt which has been discharged under a deed of composition is not a good consideration for a promissory note which is subsequently given to secure payment of the debt (*Re Hall, Ex parte Hall* (1835), 1 Deac. 171). See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 269. A ratification by a person of full age of a voidable contract made by him during infancy was formerly binding, but is now rendered ineffective by the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2; and a negotiable instrument given after majority in respect of a loan during infancy is void, even as against a holder in due course (Betting and Loans (Infants) Act, 1892 (55 Vict. c. 4), s. 5). See title INFANTS AND CHILDREN.

(*g*) *Lampleigh* v. *Brathwait* (1615), Hob. 105; 1 Smith, L. C., 11th ed., 141; *Bradford* v. *Roulston* (1858), 8 I. C. L. R. 468.

(*h*) *Kennedy* v. *Broun* (1863), 13 C. B. (N. S.) 677, at p. 740; *Wilkinson* v. *Oliveira* (1835), 1 Bing. (N. C.) 490; *Re Casey's Patents, Stewart* v. *Casey*, [1892] 1 Ch. 104, C. A., *per* BOWEN, L.J., at p. 115. Several of the older cases on this subject were decided upon the ground that a moral obligation forms sufficient consideration for a promise. This doctrine, as has been already pointed out, is no longer recognised by English law, but the decisions in the cases to which reference is made may be supported upon the ground which is stated in the text.

(*i*) *Watson* v. *Turner* (1767), Buller, Nisi Prius, p. 147; *Wing* v. *Mill* (1817), 1 B. & Ald. 104. See title POOR LAW.

(*k*) *Paynter* v. *Williams* (1833), 1 Cr. & M. 810.

(*l*) *Ibid.*

(*m*) *Shadwell* v. *Shadwell* (1860), 9 C. B. (N. S.) 159; *Luders* v. *Anstey* (1799), 4 Ves. 501. But a post-nuptial agreement or settlement is regarded as volun-

by each to marry the other is sufficient valuable consideration for the promise by the other (*n*).

Money held.

804. Where a person has in his custody money belonging to another, and is instructed by the owner of the money to hold it as the money of a third person, he becomes liable to the third person for the money as soon as he notifies to the third person that the money is held on his behalf. In this case the person holding the money holds it as agent for the third person, and the consideration for his promise is the receipt of the money from the original debtor (*o*).

Gratuitous bailment.

805. In the case of a gratuitous bailment of goods, the fact that the owner has parted with possession of the goods is sufficient consideration for a promise by the bailee to take reasonable care of the goods or to perform services in relation to them (*p*).

Gratuitous undertaking.

806. A person who promises to perform services for another without valuable consideration incurs no liability for a refusal or failure to perform the services (*q*); but if he does perform them, he is bound to exercise reasonable care, the intrusting him with the performance being sufficient consideration for such an undertaking; and if he causes damage by his negligence, the fact that he is not remunerated for the services does not protect him from liability (*r*).

tary in the absence of consideration other than the marriage (*Butterfield* v. *Heath* (1852), 15 Beav. 408; *Shurmur* v. *Sedgwick* (1883), 24 Ch. D. 597). As to who are considered parties to the valuable consideration in the case of marriage settlements, and for a detailed treatment of the subject generally, see title SETTLEMENTS.

(*n*) See title HUSBAND AND WIFE.

(*o*) *Lilly* v. *Hays* (1836), 5 Ad. & El. 548; *Griffin* v. *Weatherby* (1868), L. R. 3 Q. B. 753; *Crowfoot* v. *Gurney* (1832), 9 Bing. 372; *Walker* v. *Rostron* (1842), 9 M. & W. 411; *Noble* v. *National Discount Co.* (1860), 5 H. & N. 225; *Hamilton* v. *Spottiswoode* (1849), 4 Exch. 200.

(*p*) *Hart* v. *Miles* (1858), 4 C. B. (N. S.) 371. See title BAILMENT, Vol. I., p. 526.

(*q*) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; 1 Smith, L. C., 11th ed., 173; *Elsee* v. *Gatward* (1793), 5 Term Rep. 143; *Balfe* v. *West* (1853), 13 C. B. 466; and see *per* WILLES, J., in *Skelton* v. *London and North Western Rail. Co.* (1867), L. R. 2 C. P. 631, at p. 636.

(*r*) *Moffatt* v. *Bateman* (1869), L. R. 3 P. C. 115; *Wilson* v. *Brett* (1843), 11 M. & W. 113; *Beal* v. *South Devon Rail. Co.* (1864), 3 H. & C. 337, Ex. Ch.; *Shiells* v. *Blackburne* (1789), 1 Hy. Bl. 159; *Whitehead* v. *Greetham* (1825), 2 Bing. 464, Ex. Ch.; *Giblin* v. *McMullen* (1869), L. R. 2 P. C. 317; *Wilkinson* v. *Coverdale* (1793), 1 Esp. 75; *Doorman* v. *Jenkins* (1834), 2 Ad. & El. 256; *Dartnall* v. *Howard* (1825), 4 B. & C. 345; *Donaldson* v. *Haldane* (1840), 7 Cl. & Fin. 762, H. L. See also title BAILMENT, Vol. I., p. 531.

Part IV.—Void and Illegal Contracts.

SECT. 1. In General.

SECT. 1.—*In General.*

Classes of void contracts.

807. There are several classes of contracts which, though perfect in point of form, cannot be enforced at law (*s*). Contracts which are expressly prohibited by statute form one of these classes. Another class consists of contracts which are illegal at common law, as involving the commission of a crime or tort, and a third class consists of contracts which are unlawful as being contrary to public policy, such as contracts conducing to sexual immorality. A fourth class consists of contracts which are not actually unlawful, but merely void, either by statute, such as gaming and wagering contracts, or on grounds of public policy, such as contracts in general restraint of trade (*t*). The term "unlawful" or "illegal" is not uncommonly applied to all of these classes of contracts, but is more accurately confined to contracts falling within the first three divisions (*a*).

If the illegality of a transaction is brought to the notice of the court and the person invoking the aid of the court is himself implicated in the illegality, the court will not assist him, even if the defendant has not pleaded the illegality and does not wish to raise that objection (*b*).

Collateral agreements.

Contracts which belong to any of these classes are void and have no legal effect, but the distinction between contracts which are illegal in the sense that they are contrary to law and contracts which are void, but not unlawful, is of importance in relation to collateral agreements. Thus, a security which is given for the payment of a debt arising out of a contract which is contrary to law is tainted with the illegality of the original transaction and cannot be enforced; but if the contract is merely void a security for payment of a debt arising out of it is in the position of an agreement made without consideration, and if it is made under seal can be enforced (*c*).

(*s*) As to contracts which are either void or voidable on the ground of want of capacity, see p. 341, *ante;* as to contracts which are voidable on the ground of duress, undue influence, fraud etc., see pp. 356 *et seq.*, *ante;* and as to contracts which are unenforceable owing to the want of written evidence, see p. 361, *ante.*

(*t*) *Mitchell* v. *Reynolds* (1711), 1 P. Wms. 181; 1 Smith, L. C., 11th ed., 406; *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321, C. A., *per* FRY, L.J., at p. 342; *Hyams* v. *Stuart King*, [1908] 2 K. B. 696, C. A., *per* FARWELL, L.J., at p. 725.

(*a*) *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A. C. 25, *per* Lord HALSBURY, L.C., at p. 39, and *per* Lord BRAMWELL, at p. 46.

(*b*) *Scott* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A.; *Gedge* v. *Royal Exchange Assurance Corporation*, [1900] 2 Q. B. 214; *Royal Exchange Assurance Corporation* v. *Sjoforsakrings Aktiebolaget Vega*, [1902] 2 K. B. 384, C. A. This principle has recently been extended to a contract which is merely void under the Gaming Acts (*Luckett* v. *Wood* (1908), 24 T. L. R. 617; and see *Thomas* v. *Dey* (1908), 24 T. L. R. 272; *Connolly* v. *Consumers' Cordage Co.* (1903), 89 L. T. 347, P. C.).

(*c*) See p. 410, *post.*

SECT. 1. In General.

Ultra vires.

808. There is another class of so-called contracts consisting of agreements which, although not unlawful, are void as being *ultra vires*. The principle applies to all incorporated bodies, and is based on the rule that a body of persons incorporated for certain purposes has no existence in law except for those purposes. It follows that any agreement of a corporation or incorporated company which is not within the scope of, nor ordinarily incidental to, the objects specified by the charter, statute, memorandum of association, or other instrument of incorporation, is void, even if it is assented to or ratified by every member of the corporation or company (*d*).

SECT. 2.—*Nature of Illegality.*

Illegality.

809. A contract is illegal where the subject-matter of the promise is illegal, or where the consideration or any part of it is illegal (*e*). A contract which is on the face of it perfectly legal may yet be an illegal contract, if the purpose for which it is made is illegal—for instance, where it forms part of a transaction the object of which is illegal (*f*). Thus, money lent for an illegal purpose cannot be recovered back after such purpose has been wholly or partially carried out (*g*), and no action lies to recover money paid at the request of another in pursuance of an illegal purpose (*h*).

(*d*) See *Hawkes* v. *Eastern Counties Rail. Co.* (1855), 5 H. L. Cas. 331; *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L. R. 7 H. L. 653. For a detailed treatment of this subject, see titles COMPANIES, Vol. V.; CORPORATIONS.

(*e*) *Herman* v. *Jeuchner* (1885), 15 Q. B. D. 561, C. A. *per* BRETT, M.R., at p. 563.

(*f*) For instance, the sale of goods for the purpose of their being smuggled (*Biggs* v. *Lawrence* (1789), 3 Term Rep. 454; *Clugas* v. *Penaluna* (1791), 4 Term Rep. 466; *Lightfoot* v. *Tenant* (1796), 1 Bos. & P. 551); the sale of drugs for use in brewing beer in contravention of an Act of Parliament (*Langton* v. *Hughes* (1813), 1 M. & S. 593); the letting of lodgings for immoral purposes (*Girardy* v. *Richardson* (1793), 1 Esp. 13; *Jennings* v. *Throgmorton* (1825), Ry. & M. 251; *Appleton* v. *Campbell* (1826), 2 C. & P. 347; *Smith* v. *White* (1866), L. R. 1 Eq. 626); the letting of rooms for blasphemous lectures (*Cowan* v. *Milbourn* (1867), L. R. 2 Exch. 230; the delivery of goods for a fraudulent purpose (*Taylor* v. *Bowers* (1875), 1 Q. B. D. 291); recovery of property held under illegal trust (*Symes* v. *Hughes* (1869), L. R. 9 Eq. 475). For instances of contracts for the insurance of an illegal risk, see title INSURANCE.

(*g*) *Cannan* v. *Bryce* (1819), 3 B. & Ald. 179; *M'Kinnell* v. *Robinson* (1838), 3 M. & W. 434; *Foot* v. *Baker* (1843), 5 Man. & G. 335. See also *Collins* v. *Blantern* (1767), 2 Wils. 341, 1 Smith, L. C., 11th ed., 368; *Kearley* v. *Thompson* (1890), 24 Q. B. D. 742, C. A., and cases there cited.

(*h*) *Ex parte Mather* (1797), 3 Ves. 373; *Amory* v. *Meryweather* (1824), 2 B. & C. 573; *De Begnis* v. *Armistead* (1833), 10 Bing. 107; *Re Parker* (1882), 21 Ch. D. 408, C. A. This does not apply to a payment made at the request of another under a contract which is void but not illegal, such as a wager. Money paid at the request of another in discharge of a gaming debt could be recovered before the Gaming Act, 1892 (55 Vict. c. 9) (*Jessopp* v. *Lutwyche* (1854), 10 Exch. 614; *Knight* v. *Cambers* (1855), 15 C. B. 562; *Rosewarne* v. *Billing* (1863), 15 C. B. (N. S.) 316). Premiums paid in respect of wagering insurance policies cannot be recovered (*Howard* v. *Refuge Friendly Society* (1886), 54 L. T. 644). See title GAMING AND WAGERING.

SECT. 2. **Nature of Illegality.**

Illegal purpose.

810. A person who supplies goods or lets premises knowing that they are to be used for an illegal purpose cannot recover the price or the rent, even though he takes no part in the unlawful transaction (*i*) and there is no stipulation that payment shall be made out of the proceeds of the illegal acts (*k*).

Illegal promise.

811. A contract to do a thing which cannot be performed without a violation of the law is void, whether the parties knew the law or not; but in order to avoid a contract which can be legally performed on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the intention to break the law (*l*). The law presumes against illegality in such cases (*m*).

Ignorance of illegality.

812. Where a person has entered into a contract to let rooms in ignorance of the hirer's intention to use them for an illegal purpose, he is entitled to refuse to carry out the contract on subsequently discovering the other party's intention (*n*); but where such a contract has been executed and possession of the premises has been given to the tenant, the validity of the contract is not affected by the fact that the premises are used for immoral purposes, or that the tenant fraudulently concealed his intention to use them for such purposes at the time when the lease was granted (*o*). An innocent party is entitled to payment for work done under a contract before he became aware of the other party's intention to make use of his work for an illegal purpose (*p*).

SECT. 3.—*Sources of Illegality.*

SUB-SECT. 1.—*Contracts void at Common Law.*

(1) *Agreements to Commit a Wrongful Act.*

Wrongful acts.

813. *Ex turpi causa non oritur actio.* An agreement to commit an unlawful act, whether it amounts to an indictable offence or not, is void, and an agreement which is innocent in form cannot be

(*i*) *Cannan* v. *Bryce* (1819), 3 B. & Ald. 179; *Seymour* v. *London and Provincial Marine Insurance Co.* (1872), 41 L. J. (C. P.) 193; *Gas Light and Coke Co.* v. *Turner* (1840), 6 Bing. (N. C.) 324, Ex. Ch.; *Ritchie* v. *Smith* (1848), 6 C. B. 462; *Fisher* v. *Bridges* (1854), 3 E. & B. 642, Ex. Ch.; see also *Scarfe* v. *Morgan* (1838), 4 M. & W. 270.

(*k*) *Pearce* v. *Brooks* (1866), L. R. 1 Exch. 213.

(*l*) *Waugh* v. *Morris* (1873), L. R. 8 Q. B. 202; and see *Twaites* v. *Coulthwaite*, [1896] 1 Ch. 496.

(*m*) *Bennett* v. *Clough* (1818), 1 B. & Ald. 461; *Sissons* v. *Dixon* (1826), 5 B. & C. 758; *Lewis* v. *Davison* (1839), 4 M. & W. 654; *Hire Purchase Furnishing Co.* v. *Richens* (1887), 20 Q. B. D. 387, C. A. See also title EVIDENCE, as to presumptions.

(*n*) *Cowan* v. *Milbourn* (1867), L. R. 2 Exch. 230.

(*o*) *Feret* v. *Hill* (1854), 15 C. B. 207. That case, however, only decided that the lessor was not entitled to refuse to perform the contract on the grounds stated; it did not deal with the question whether he was entitled to rescission of the contract in equity.

(*p*) *Clay* v. *Yates* (1856), 1 H. & N. 73.

enforced if it is entered into for the purpose of carrying out or assisting in carrying out an illegal transaction (*q*).

A contract made with the purpose of committing a fraud on a third person or on the public cannot be enforced (*r*). Where a debtor enters into a deed of composition with his creditors, a secret agreement, whether by the debtor or a third person, to give one of the creditors an additional benefit is a fraud upon the other creditors, because each creditor consents to lose part of his debt in consideration of the others doing the same, and equality among the creditors is an implied condition of the arrangement (*s*). In such a case not only is the creditor who has entered into the secret agreement with the debtor unable to enforce the stipulation for his benefit, but the deed remains operative against him so that he loses both the right to the composition and his original debt which has been released (*t*). It is immaterial that the creditor receiving preferential treatment guarantees payment of a specified composition to the other creditors if they do not consent to the arrangement (*a*).

Fraud on third person.

Similarly, any agreement made with the object of giving a creditor preferential treatment in the event of the bankruptcy of a debtor, such as an agreement for a security or for additional security to take effect only in case of bankruptcy (*b*), or the purchase

Fraud on bankruptcy laws.

(*q*) For instance, a contract for the sale of obscene prints (*Fores* v. *Johnes* (1802), 4 Esp. 97); a contract to print an immoral book or a libel (*Poplett* v. *Stockdale* (1825), Ry. & M. 337; *Clay* v. *Yates* (1856), 1 H. & N. 73; *Apthorp* v. *Neville & Co.* (1907), 23 T. L. R. 575); an agreement to indemnify a person against the costs of an action brought against him in respect of a libel published by him at the defendant's request (*Shackell* v. *Rosier* (1836), 2 Bing. (N. C.) 634; *Witt, Smith & Son* v. *Clinton* (1908), 25 T. L. R. 34); an agreement to buy shares at a fictitious premium in order to induce the public to believe that there was a market for the shares at a premium (*Scott* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A.); an agreement to assist a person in carrying on a business which he could not lawfully carry on because he did not possess the qualifications required by law (*Davies* v. *Makuna* (1885), 29 Ch. D. 596, C. A.).

(*r*) *Willis* v. *Baldwin* (1780), 2 Doug. (K. B.) 450; *Jackson* v. *Duchaire* (1790), 3 Term Rep. 551; *Begbie* v. *Phosphate Sewage Co.* (1875), L. R. 10 Q. B. 491, affirmed (1876) 1 Q. B. D. 679, C. A.; *Taylor* v. *Bowers* (1876), 1 Q. B. D. 291; *Odessa Tramways Co.* v. *Mendel* (1878), 8 Ch. D. 235, C. A.; *Post* v. *Marsh* (1880), 16 Ch. D. 395; *Scott* v. *Brown, Doering, McNab & Co.*, *supra* (rigging the market); *Re Ambrose Lake Tin and Copper Mining Co., Ex parte Taylor, Ex parte Moss* (1880), 14 Ch. D. 390, C. A.

(*s*) *Cockshott* v. *Bennett* (1788), 2 Term Rep. 763; *Leicester* v. *Rose* (1803), 4 East, 372; *Jackman* v. *Mitchell* (1807), 13 Ves. 581; *Knight* v. *Hunt* (1829), 5 Bing. 432; *Howden* v. *Haigh* (1840), 11 Ad. & El. 1033; *Higgins* v. *Pitt* (1849), 4 Exch. 312; *Mallalieu* v. *Hodgson* (1851), 16 Q. B. 689; *Mare* v. *Sandford* (1859), 1 Giff. 288; *Dauglish* v. *Tennent* (1866), L. R. 2 Q. B. 49; *McKewan* v. *Sanderson* (1875), L. R. 20 Eq. 65; *Re Milner, Ex parte Milner* (1885), 15 Q. B. D. 605, C. A.; *Re Andrews, Ex parte Barrow* (1881), 18 Ch. D. 464, C. A.; and see *Re Griffith, Ex parte Official Receiver* (1897), 66 L. J. (Q. B.) 763.

(*t*) *Re Cross* (1848), 4 De G. & Sm. 364, n.; *Re Hodgson, Ex parte Oliver* (1851), 4 De G. & Sm. 354; *Re Harvey, Ex parte Phillips* (1888), 36 W. R. 567; *Re Myers, Ex parte Myers*, [1908] 1 K. B. 941.

(*a*) *Staines* v. *Wainwright* (1839), 6 Bing. (N. C.) 174.

(*b*) *Re Jeavons, Ex parte Mackay, Ex parte John Brown & Co.* (1873), 42 L. J.

SECT. 3. Sources of Illegality.

of bills at an undervalue from a person who is known to be contemplating bankruptcy (*c*), or the agreement by which the assets of a member of the Stock Exchange upon being declared a defaulter vest in the official assignee for the exclusive benefit of the Stock Exchange creditors (*d*), is void as a fraud on the bankruptcy laws (*e*).

(2) *Agreements contrary to Public Policy.*

Injury to public.

814. Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy (*f*). The question whether a particular agreement is contrary to public policy is a question of law. It has been said, however, that this branch of the law should not be extended, for judges are more to be trusted as interpreters of the law than as expounders of what is called public policy (*g*). The determination of what is contrary to the so-called policy of the law necessarily varies from time to time. Many transactions are upheld now which in a former generation would have been avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion (*h*).

Benefit from crime.

815. It is contrary to public policy that anyone should be allowed to benefit by his own criminal act, and the courts will not enforce rights directly resulting to the person asserting them from the crime of that person (*i*).

Interfering with elections.

816. An agreement which tends to interfere with the free and proper exercise of the franchise, or corruptly to influence the action of members of the legislature, is unenforceable as being contrary to

(BCY.), 68, C. A.; *Re Thompson, Ex parte Williams* (1877), 7 Ch. D. 138, C. A. On this principle a clause in a building contract providing for the forfeiture of materials to the owner in the event of the bankruptcy of the builder was held void (*Re Harrison, Ex parte Jay* (1880), 14 Ch. D. 19, C. A.; compare *Re Garrud, Ex parte Newitt* (1881), 16 Ch. D. 522, C. A.; and see title BUILDING CONTRACTS ETC., Vol. III., p. 153).

(*c*) *Jones* v. *Gordon* (1877), 2 App. Cas. 616.

(*d*) *Tomkins* v. *Saffery* (1877), 3 App. Cas. 213.

(*e*) See also *Re Myers, Ex parte Myers*, [1908] 1 K. B. 941; and title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 279 *et seq.*

(*f*) *Egerton* v. *Brownlow (Earl)* (1853), 4 H. L. Cas. 1, *per* Lord TRURO, at p. 196; see also *Hilton* v. *Eckersley* (1856), 6 E. & B. 47, 66; *Janson* v. *Driefontein Mines*, [1902] A. C. 484.

(*g*) *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A. C. 25, *per* Lord BRAMWELL, at p. 45. "The doctrine of public policy is regarded nowadays as one rather for the legislature than the courts, although the courts will not shrink from acting on it if the contract sought to be enforced leads to immorality or crime" (*per* FARWELL, L.J., in *Hyams* v. *Stuart King*, [1908] 2 K. B. 696, C. A., at p. 727; see also at pp. 710, 711).

(*h*) *Evanturel* v. *Evanturel* (1874), L. R. 6 P. C. 1, at p. 29. Market rigging contracts are illegal (*Scott* v. *Brown*, [1892] 2 Q. B. 724).

(*i*) *Amicable Society* v. *Bolland* (1830), 4 Bli. (N. S.) 194, H. L.; *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147, C. A.

public policy (*k*); but where a person is entitled to give his votes as he pleases, in a matter not affecting the interests of the public, as in the case of a subscriber to a charity, there is nothing contrary to public policy in a bargain between two subscribers to vote for particular candidates (*l*).

Obtaining titles.

817. A disposition of property which is made subject to a condition that the beneficiary should obtain a title of honour for which he might be unfit is void as being mischievous to the community at large (*m*).

Sale of public office.

818. A public office is deemed to be a place of public trust, and, even apart from statute (*n*), a contract for the sale or resignation of such an office is contrary to public policy and cannot be enforced (*o*). The sale of a recommendation to a public office, or an agreement by a person for pecuniary reward to use his influence in order to obtain such an office for another, is void on the same ground (*p*). An assignment of or charge on the salary or emoluments of such an office is also void, for the presumption is that these are required for the purpose of upholding the dignity of the office and enabling the holder of it to perform his duties in a proper manner (*q*). This principle, however, applies only where the office is in some way connected with the public service and the salary is paid out of national funds, and not out of local rates (*r*), and it has no application in cases where the office is a sinecure or the duties attached to it have ceased (*s*).

On the same principle the assignment or charging of a pension

(*k*) *Allen* v. *Hearn* (1785), 1 Term Rep. 56; *Coppock* v. *Bower* (1838), 4 M. & W. 361; *Howden* (*Lord*) v. *Simpson* (1839), 10 Ad. & El. 793, Ex. Ch., affirmed (1842), 9 Cl. & Fin. 61, H. L.; *Shrewsbury* (*Earl*) v. *North Staffordshire Rail. Co.* (1865), L. R. 1 Eq. 593; *Cooper* v. *Slade* (1858), 6 H. L. Cas. 746; *Wallis* v. *Portland* (*Duke*) (1798), 8 Bro. Parl. Cas. 161; *Osborne* v. *Amalgamated Society of Railway Servants* (1908), 25 T. L. R. 107, C. A.

(*l*) *Bolton* v. *Madden* (1873), L. R. 9 Q. B. 55.

(*m*) *Egerton* v. *Brownlow* (*Earl*) (1853), 4 H. L. Cas. 1.

(*n*) Sale of Offices Acts, 1551 and 1809 (5 & 6 Edw. 6, c. 16; 49 Geo. 3, c. 126). See *R.* v. *Charretie* (1849), 13 Q. B. 447; *Layng* v. *Paine* (1745), Willes, 571; *Godolphin* v. *Tudor* (1705), 2 Salk. 468.

(*o*) Co. Litt. 234 a; *Hanington* v. *Du-Chatel* (1781), 1 Bro. C. C. 124; *Garforth* v. *Fearon* (1787), 1 Hy. Bl. 327; *Parsons* v. *Thompson* (1790), 1 Hy. Bl. 322; *Blachford* v. *Preston* (1799), 8 Term Rep. 89; *Card* v. *Hope* (1824), 2 B. & C. 661; *Richardson* v. *Mellish* (1824), 2 Bing. 229; *Waldo* v. *Martin* (1825), 4 B. & C. 319; *Hopkins* v. *Prescott* (1847), 4 C. B. 578; *Græme* v. *Wroughton* (1855), 11 Exch. 146; *Eyre* v. *Forbes* (1862), 12 C. B. (N. S.) 191.

(*p*) *Hartwell* v. *Hartwell* (1799), 4 Ves. 810; *Hughes* v. *Statham* (1825), 4 B. & C. 187; *Savill Brothers* v. *Langman* (1898), 79 L. T. 44, C. A.; and see *Arkwright* v. *Cantrell* (1837), 7 Ad. & El. 565.

(*q*) *Collyer* v. *Fallon* (1823), Turn. & R. 459; *Methwold* v. *Walbank* (1751), 2 Ves. Sen. 238; *Flarty* v. *Odlum* (1790), 3 Term Rep. 681; *Barwick* v. *Reade* (1791), 1 Hy. Bl. 627; *Lidderdale* v. *Montrose* (*Duke*) (1791), 4 Term Rep. 248; *Palmer* v. *Bate* (1821), 2 Brod. & Bing. 673; *Wells* v. *Foster* (1841), 8 M. & W. 149; *Liverpool Corporation* v. *Wright* (1859), 28 L. J. (CH.) 868; *Apthorpe* v. *Apthorpe* (1887), 12 P. D. 192, C. A.; *McCreery* v. *Bennett*, [1904] 2 I. R. 69.

(*r*) *Re Mirams*, [1891] 1 Q. B. 594.

(*s*) *Grenfell* v. *Windsor* (*Dean and Canons*) (1840), 2 Beav. 544.

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given for the support of a peerage or other dignity is void as being contrary to public policy (*t*).

Master and servant.

819. A contract entered into between a master and his servant by which the latter agrees to waive the breach by the master of an obligation imposed upon him by statute for the protection of his servants in the course of their employment is contrary to public policy (*a*); but an agreement by which a workman gives up his right to compensation under the Employers Liability Act, 1880 (*b*), in consideration of his employer's subscribing to a fund from which the workman is entitled to receive compensation in case of injury is not contrary to public policy.

Future separation of husband and wife.

820. An agreement which provides for a separation to take place between husband and wife at some future time is void as contrary to public policy (*c*); but where the parties have determined to separate at once, the terms on which the separation is to take place may form the subject of an agreement between them (*d*). A covenant not to sue for restitution of conjugal rights is commonly inserted in such agreements, and is not illegal or contrary to public policy (*e*), nor does the absence of a *dum casta* clause invalidate a covenant by the husband to pay an annuity to the wife (*f*).

Parent and child.

821. A father cannot bind himself by contract to abandon the right to control the religious education of his children, since such right is given to him not for his own benefit, but for that of the children (*g*); nor can the mother of an illegitimate child divest herself

(*t*) *Davis* v. *Marlborough* (*Duke*) (1818), 1 Swan. 74. As to simoniacal contracts, see title ECCLESIASTICAL LAW; and as to usury, see title MONEY AND MONEY LENDING.

(*a*) *Baddeley* v. *Granville* (*Earl*) (1887), 19 Q. B. D. 423, *per* WILLS, J.

(*b*) 43 & 44 Vict. c. 42; *Griffiths* v. *Dudley* (*Earl*) (1882), 9 Q. B. D. 357. An agreement by which a workman gives up his right to compensation for injuries under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), is avoided by s. 3 of that Act except in the case of a scheme certified by the Registrar of Friendly Societies. See p. 405, *post*, and title MASTER AND SERVANT.

(*c*) *Hindley* v. *Westmeath* (*Marquis*) (1827), 6 B. & C. 200; *Cocksedge* v. *Cocksedge* (1844), 14 Sim. 244; *Westmeath* (*Marquis*) v. *Salisbury* (*Marquis*) (1831), 5 Bli. (N. S.) 339, H. L.; *Wilson* v. *Wilson* (1848), 1 H. L. Cas. 538; *Vansittart* v. *Vansittart* (1858), 4 K. & J. 62, *per* TURNER, L.J.; *Cartwright* v. *Cartwright* (1853), 3 De G. M. & G. 982, C. A.; *H.* v. *W.* (1857), 3 K. & J. 382. See title HUSBAND AND WIFE.

(*d*) *Jee* v. *Thurlow* (1824), 2 B. & C. 541; *Jones* v. *Waite* (1842), 9 Cl. & Fin. 101, H. L.; *Hunt* v. *Hunt* (1862), 4 De G. F. & J. 221; *Besant* v. *Wood* (1879), 12 Ch. D. 605; *Wilson* v. *Muskett* (1833), 3 B. & Ad. 743; *Randle* v. *Gould* (1857), 8 E. & B. 457. See title HUSBAND AND WIFE.

(*e*) *Marshall* v. *Marshall* (1879), 5 P. D. 19; *Clark* v. *Clark* (1885), 10 P. D. 188, C. A.; *Aldridge* v. *Aldridge* (1888), 13 P. D. 210. See *Royle* v. *Royle*, [1909] P. 24, where an agreement not to take proceedings for separation, divorce, or maintenance was held bad.

(*f*) *Kendall* v. *Webster* (1862), 1 H. & C. 400; *Fearon* v. *Aylesford* (*Earl*) (1884), 14 Q. B. D. 792, C. A.; *Sweet* v. *Sweet*, [1895] 1 Q. B. 12; *Wasteneys* v. *Wasteneys*, [1900] A. C. 446.

(*g*) *Andrews* v. *Salt* (1873), 8 Ch. App. 622; *Re Agar-Ellis*, *Agar-Ellis* v.

by contract of the obligations which are imposed on her by law in respect of the child (*h*).

Restraint of marriage.

822. A contract which is in general restraint of marriage is unenforceable (*i*); but this rule does not apply where the restriction is only against marriage with a particular person or limited class of persons (*j*), nor where the restraint relates to a second marriage whether of a man or of a woman (*k*).

Marriage brokage.

823. Marriage brokage contracts, that is to say, contracts for the payment of money in consideration of procuring a marriage, are illegal (*l*), whether the contract is to procure a marriage with a particular individual or with one out of a class of persons, or to procure a marriage generally with any person who may be considered suitable. In either case the evil consists in the introduction of a money payment into that which should be free from any such taint (*m*).

A contract under which a parent or guardian acquires a personal benefit which is given in order to induce him to consent to the marriage of his child or ward, or to withdraw his opposition, is void for similar reasons (*n*).

Gaming and wagering.

824. Contracts by way of gaming or wagering are made void by statute, and no action can be brought to recover any sum of money alleged to be won upon a wager (*o*); but such contracts are not illegal, and a promise made by the loser of a wager to pay the amount lost in consideration of the winner's forbearance to post him as a defaulter can be enforced as a new contract which is

Lasrelles (1878), 10 Ch. D. 49, C. A.; *Vansittart* v. *Vansittart* (1858), 4 K. & J. 62; *Walrond* v. *Walrond* (1858), Johns. 18; but see *Swift* v. *Swift* (1865), 34 L. J. (CH.) 394. The father, however, may agree in a separation deed to give up the custody or control of his infant children to the mother, but such such agreement will not be enforced if the court is of opinion that it will not be for the benefit of the infants to give effect to it (Custody of Infants Act, 1873 (36 & 37 Vict. c. 12), s. 2). See titles HUSBAND AND WIFE; INFANTS AND CHILDREN, for a detailed treatment of this subject.

(*h*) *Humphrys* v. *Polak*, [1901] 2 K. B. 385, C. A.

(*i*) *Baker* v. *White* (1690), 2 Vern. 215; *Lowe* v. *Peers* (1768), 4 Burr. 2225; *Hartley* v. *Rice* (1808), 10 East, 22; *Bellairs* v. *Bellairs* (1874), L. R. 18 Eq. 510; *Morley* v. *Rennoldson* (1843), 2 Hare, 570. A covenant not to revoke a will is void in so far as it applies to a revocation by marriage (*Robinson* v. *Ommanney* (1883), 23 Ch. D. 285, C. A.).

(*j*) *Perrin* v. *Lyon* (1807), 9 East, 170 (prohibition of marriage with a Scotsman); *Jenner* v. *Turner* (1880), 16 Ch. D. 188 (marriage with a domestic servant).

(*k*) *Newton* v. *Marsden* (1862), 31 L. J. (CH.) 690; *Allen* v. *Jackson* (1875), 1 Ch. D. 399, C. A. As to the effect of conditions in partial restraint of marriage, see title REAL PROPERTY AND CHATTELS REAL.

(*l*) *Arundel* v. *Trevillian* (1634), 1 Rep. Ch. 47; *Hall* v. *Potter* (1695), 3 Lev. 411; *Scribblehill* v. *Brett* (1703), 4 Bro. Parl. Cas. 144; *Keat* v. *Allen* (1707), 2 Vern. 588; *Cole* v. *Gibson* (1750), 1 Ves. Sen. 503; *King* v. *Burr* (1810), 3 Mer. 693.

(*m*) *Hermann* v. *Charlesworth*, [1905] 2 K. B. 123, C. A.

(*n*) *Hamilton* (*Duke*) v. *Mohun* (*Lord*) (1710), 1 P. Wms. 118.

(*o*) See title GAMING AND WAGERING.

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distinct from the original wagering contract, and such an agreement is not contrary to public policy (*p*).

(3) *Agreements tending to pervert the Course of Justice.*

Interference with course of justice.

825. Any contract which has a tendency, however slight, to affect the due administration of justice is illegal (*q*). Thus, an agreement to pay money is illegal if the consideration is the forbearance to take criminal proceedings against the person making the payment (*r*), and so is an agreement for the withdrawal of an election petition in which charges of bribery are made (*s*), or a promise for valuable consideration not to oppose a bankrupt's application for discharge (*t*), or to stay proceedings to strike a solicitor off the rolls (*u*), or a secret agreement by a shareholder in a company which is being wound up to prevent or interfere with the disposal of the company's assets in the manner provided by law (*v*).

A promise to marry a woman if she obtains a divorce from her present husband by improperly concealing material facts from the court is contrary to public policy (*w*).

Indemnity to bail.

826. Where a defendant in a criminal case has been ordered to find bail, a promise given either by him or by a third person to indemnify his surety against liability on his recognizances is illegal, because it deprives the public of the protection which the law affords for securing the appearance or good behaviour of the defendant (*x*).

(*p*) *Bubb* v. *Yelverton* (1870), L. R. 9 Eq. 471; *Re Browne, Ex parte Martingell*, [1904] 2 K. B. 133; *Chapman* v. *Franklin* (1905), 21 T. L. R. 515; *Goodson* v. *Baker* (1908), 98 L. T. 415; *Goodson* v. *Grierson*, [1908] 1 K. B. 761, C. A.; *Hyams* v. *Stuart King*, [1908] 2 K. B. 696, C. A.; *Hodgkins* v. *Simpson* (1908), 25 T. L. R. 53. Compare *Re Comar, Ex parte Ronald* (1908), 52 Sol. Jo. 642, C. A.; *Ladbroke & Co.* v. *Buckland* (1908), 25 T. L. R. 55. Other classes of contracts which are void as being contrary to public policy are dealt with below under separate headings, and in other portions of this work. As to contracts in restraint of trade, see title TRADE AND TRADE UNIONS; contracts with alien enemies, title ALIENS, Vol. I., pp. 310—312; insurance of enemies' goods, title INSURANCE. As to agreements which are void on the ground of maintenance or champerty, see title ACTION, Vol. I., pp. 51—55.

(*q*) *Egerton* v. *Brownlow (Earl)* (1853), 4 H. L. Cas. 1, *per* Lord LYNDHURST, at p. 163; *Lound* v. *Grimwade* (1888), 39 Ch. D. 605.

(*r*) *Lound* v. *Grimwade*, *supra*.

(*s*) *Coppock* v. *Bower* (1838), 4 M. & W. 361.

(*t*) *Hall* v. *Dyson* (1852), 17 Q. B. 785; *Hills* v. *Mitson* (1853), 8 Exch. 751; *Kearley* v. *Thomson* (1890), 24 Q. B. D. 742, C. A.

(*u*) *Kirwan* v. *Goodman* (1841), 9 Dowl. 330.

(*v*) *Elliott* v. *Richardson* (1870), L. R. 5 C. P. 744. An agreement not to plead fraud is bad (*Pearson* v. *Dublin Corporation*, [1907] A. C. 351).

(*w*) *Prevost* v. *Wood* (1905), 21 T. L. R. 684. For other examples of agreements to interfere with course of justice, see *Gipps* v. *Hume* (1861), 31 L. J. (CH.) 37 (withdrawal of divorce proceedings); *Brown* v. *Brine* (1875), 1 Ex. D. 5 (suppressing fact of adultery).

(*x*) *Herman* v. *Jeuchner* (1885), 15 Q. B. D. 561, C. A.; *Consolidated Exploration and Finance Co.* v. *Musgrave*, [1900] 1 Ch. 37. But there is nothing unlawful

Stifling prosecution.

827. An agreement to stifle a prosecution in respect of an offence of a public nature is against public policy and illegal, because the effect of it is to take the administration of the law out of the hands of the judges and to put it into the hands of a private individual to determine what is to be done in the particular case (*a*). Such an agreement is none the less illegal though the prosecutor receives no personal benefit under it, and the effect of the compromise is to secure the object for which the prosecution was brought (*b*).

There is, however, nothing to prevent a creditor from taking a security from his debtor for the payment of a debt due to him, even if the debtor is induced to give the security by a threat of criminal proceedings, so long as there is no agreement not to prosecute (*c*). Where the commission of an offence gives a right of action for damages to a party injured, it is competent for him to compromise his claim for damages in any way that he thinks fit (*d*); and in the case of a misdemeanour where the person injured has the choice between a civil and a criminal remedy, as in cases of assault or libel, a compromise of criminal proceedings is not contrary to public policy (*e*).

Reference to arbitration.

828. An agreement which ousts the jurisdiction of the courts is void. Where a right of action has accrued it is against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals; but there is nothing to prevent the parties from agreeing that no right of action shall accrue until a third person has decided on any difference that may arise between them, and this may be made to apply not only to the question of the amount that is due, but to the question whether any liability has been incurred (*f*). An agreement which provides that the award of an arbitrator shall be final and binding, and shall not be questioned even on the ground of

in an agreement by the next-of-kin to indemnify sureties to an administration bond (*Blake* v. *Bayne*, [1908] A. C. 371, P. C.).

(*a*) *Collins* v. *Blantern* (1767), 1 Smith, L. C., 11th ed., 369; *Edgcombe* v. *Rodd* (1804), 5 East, 294; *Harding* v. *Cooper* (1816), 1 Stark. 467; *Keir* v. *Leeman* (1846), 9 Q. B. 371, Ex. Ch.; *Ex parte Critchley* (1846), 3 Dow. & L. 527; *Clubb* v. *Hutson* (1865), 18 C. B. (N. S.) 414; *Williams* v. *Bayley* (1866), L. R. 1 H. L. 200; *Brook* v. *Hook* (1871), L. R. 6 Exch. 89; *Rawlings* v. *Coal Consumers' Association* (1874), 43 L. J. (M. C.) 111; *Re Campbell, Ex parte Wolverhampton Banking Co.* (1884), 14 Q. B. D. 32; *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173, C. A.

(*b*) *Windhill Local Board of Health* v. *Vint* (1890), 45 Ch. D. 351, C. A. (compromise of indictment for non-repair of highway).

(*c*) *Ward* v. *Lloyd* (1843), 6 Man. & G. 785; *Re Mapleback, Ex parte Caldecott* (1876), 4 Ch. D. 150, C. A.; *Flower* v. *Sadler* (1882), 10 Q. B. D. 572, C. A.

(*d*) *Beeley* v. *Wingfield* (1809), 11 East, 46; *Baker* v. *Townsend* (1817), 7 Taunt. 422; *Elworthy* v. *Bird* (1825), 2 Sim. & St. 372; *Keir* v. *Leeman*, *supra*.

(*e*) *Fisher & Co.* v. *Apollinaris Co.* (1875), 10 Ch. App. 297. Otherwise if the assault is coupled with a riot and the obstruction of a police officer (*Keir* v. *Leeman*, *supra*).

(*f*) *Scott* v. *Avery* (1856), 5 H. L. Cas. 811; *Trainor* v. *Phœnix Fire Assurance Co.* (1891), 65 L. T. 825. See title ARBITRATION, Vol. I., at p. 445, and other cases there cited.

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fraud on the part of the arbitrator, is not contrary to public policy (*g*).

(4) *Immoral Contracts.*

Sexual immorality.

829. A contract which is made upon an immoral consideration or for an immoral purpose is unenforceable, and there is no distinction in this respect between immoral and illegal contracts (*h*). The immorality here alluded to is sexual immorality.

A promise by a man to pay money to a woman in consideration of illicit cohabitation which is to take place between them, or a promise to any third person in consideration of his bringing about or permitting illicit cohabitation, is void, even if made under seal (*i*); but a promise which is made in consideration of past cohabitation only is simply a voluntary promise, and if made under seal can be enforced (*k*). The mere continuance of cohabitation in such a case does not raise any presumption that the promise was given for an immoral consideration (*l*), and a bond given in respect of past cohabitation is not rendered invalid by the mere fact that the parties contemplated a continuance of the cohabitation so long as that is not the consideration for the bond (*m*).

An action lies to recover the price of goods sold or work done even though the plaintiff knew that the person with whom he was dealing was a prostitute (*n*), unless it appears that the goods were sold or the work was done for the purpose of enabling her to exercise, or assisting her in the exercise of, her immoral calling (*o*).

Promise of marriage by married person.

830. A promise made by a married man, during the lifetime of his wife, to marry another woman who knows that he is a married man is void, because it is against public policy as tending to make the husband disregard the general rules of morality, and no action

(*g*) *Jones* v. *Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314, C. A.; *London Tramways Co.* v. *Bailey* (1877), 3 Q. B. D. 217; *Tullis* v. *Jacson*, [1892] 3 Ch. 441.

(*h*) *Holman* v. *Johnson* (1775), 1 Cowp. 341; *Pearce* v. *Brooks* (1866), L. R. 1 Exch. 213. For instances of illegal contracts, see the cases cited at pp. 390 *et seq.*, *ante*.

(*i*) *Robinson* v. *Gee* (1749), 1 Ves. Sen. 251; *Walker* v. *Perkins* (1764), 1 Wm. Bl. 517; *Gray* v. *Mathias* (1800), 5 Ves. 286; *Benyon* v. *Nettlefold* (1850), 3 Mac. & G. 94; *Willyams* v. *Bullmore* (1863), 33 L. J. (CH.) 461; *Ayerst* v. *Jenkins* (1873), L. R. 16 Eq. 275; and see *Phillips* v. *Probyn*, [1899] 1 Ch. 811.

(*k*) *Annandale* (*Marchioness*) v. *Harris* (1728), 1 Bro. Parl. Cas. 250; *Gibson* v. *Dickie* (1815), 3 M. & S. 463; *Matthews* v. *L——e* (1816), 1 Madd. 558; *Binnington* v. *Wallis* (1821), 4 B. & Ald. 650; *Nye* v. *Moseley* (1826), 6 B. & C. 133; *Friend* v. *Harrison* (1827), 2 C. & P. 584; *Jennings* v. *Brown* (1842), 9 M. & W. 496; *Turner* v. *Vaughan* (1767), 2 Wils. 339; *Priest* v. *Parrot* (1750), 2 Ves. Sen. 160; *Hall* v. *Palmer* (1844), 3 Hare, 532; *Beaumont* v. *Reeve* (1846), 8 Q. B. 483.

(*l*) *Re Vallance*, *Vallance* v. *Blagden* (1884), 26 Ch. D. 353.

(*m*) *Re Wootton Isaacson*, *Sanders* v. *Smiles* (1904), 21 T. L. R. 89. See also on this subject *Ex parte Naden* (1874), 9 Ch. App. 670; and *Re Abdy*, [1895] 1 Ch. 455.

(*n*) *Lloyd* v. *Johnson* (1798), 1 Bos. & P. 340; *Bowry* v. *Bennet* (1808), 1 Camp. 348.

(*o*) *Hamilton* v. *Grainger* (1859), 5 H. & N. 40; *Pearce* v. *Brooks* (1866), L. R. 1 Exch. 213.

will lie for breach of such a promise even after the death of the wife (*p*). The same principle applies to the converse case of a promise to marry a married woman after the death of her husband, or after a divorce (*p*). If, however, the promise is made by a married man or woman who is not known to be married by the promisee at the time of the promise, an action will lie for breach of the promise at the suit of the innocent party, the remaining unmarried in the meantime being sufficient consideration to support the action (*p*).

SUB-SECT. 2.—*Contracts made void by Statute.*

Statutory prohibition.

831. Certain contracts are prohibited by statute, and in such cases, whether the prohibition is express or implied, a contract made in contravention of the statute is illegal and cannot be enforced (*q*). In other cases the contract is expressly declared by statute to be void. In a third class of cases, where the mode in which a profession or business is to be carried on is regulated by statute, no contract which is made in contravention of the statutory requirements can be enforced.

(1) *Contracts prohibited by Statute.*

Prohibited contracts.

832. The following are instances of contracts which are prohibited by statute:—The sale of any public office (*r*); simoniacal contracts, *i.e.*, corrupt agreements to present anyone to an ecclesiastical benefice for reward (*s*); contracts providing for the payment of wages otherwise than in the current coin of the realm or containing stipulations as to the manner in which any part of the wages is to be expended (*t*); contracts for the payment of certain expenses or for certain employment for the purpose of promoting or procuring the election of a candidate at a parliamentary or municipal election (*u*); lotteries (*v*); certain contracts between a local authority and their officers or servants (*w*).

Illegal associations.

Partnerships or associations carrying on business for gain which

(*p*) *Spiers* v. *Hunt*, [1908] 1 K. B. 720; *Wilson* v. *Carnley*, [1908] 1 K. B. 729, C. A.; *Wild* v. *Harris* (1849), 7 C. B. 999; *Millward* v. *Littlewood* (1850), 5 Exch. 775.

(*q*) *Bartlett* v. *Vinor* (1692), Carth. 251; *Dallax* v. *Jones* (1856), 26 L. J. (EX.) 79; *Cope* v. *Rowlands* (1836), 2 M. & W. 149; *Victorian Daylesford Syndicate, Ltd.* v. *Dott*, [1905] 2 Ch. 624.

(*r*) Sale of Offices Act, 1551 (5 & 6 Edw. 6, c. 16); Sale of Offices Act, 1809 (49 Geo. 3, c. 126). See also title PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

(*s*) 31 Eliz. c. 6. See title ECCLESIASTICAL LAW.

(*t*) Truck Act, 1831 (1 & 2 Will. 4, c. 37), ss. 1, 2; Truck Amendment Act, 1887 (50 & 51 Vict. c. 46), s. 6. See titles MASTER AND SERVANT; WORK AND LABOUR.

(*u*) Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51); Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70); and see title ELECTIONS.

(*v*) Gaming Act, 1802 (42 Geo. 3, c. 119). See *Blyth* v. *Hulton & Co., Ltd.* (1908), 24 T. L. R. 719, C. A.; *Willis* v. *Young and Stembridge*, [1907] 1 K. B. 448; and title GAMING AND WAGERING.

(*w*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 193; Public Health (Members and Officers) Act, 1885 (48 & 49 Vict. c. 53), s. 2. See title PUBLIC HEALTH ETC.

SECT. 3. Sources of Illegality.

exceed a certain number of members are prohibited (*x*), unless they are duly registered as companies; and contracts made for the purpose of carrying out the objects of an association which is so prohibited are illegal and cannot be enforced (*y*).

Imposition of penalty.

833. Where a penalty is imposed by statute upon any person who does a particular act, this may or may not imply a prohibition of that act. It is a question of construction in each case whether the legislature intended to prohibit the doing of the act altogether, or merely to make the person who did it liable to pay the penalty. If the penalty is recurrent, that is to say, if it is imposed not merely once for all but as often as the act is done, this amounts to a prohibition (*z*). Where the object of the legislature in imposing the penalty is merely the protection of the revenue, the statute will not be construed as prohibiting the act in respect of which the penalty is imposed (*a*); but where the penalty is imposed with the object solely or partly of protecting the public, though it may also be for the protection of the revenue, the act must be taken to be prohibited, and no action can be maintained on a contract which is made in contravention of the statute (*b*).

Contracts made on Sunday.

834. It is provided by statute that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business or work of his ordinary calling on Sunday, works of necessity or charity excepted (*c*). The effect of

(*x*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4; and after 1st May, 1909, Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1.

(*y*) *Re South Wales Atlantic Steamship Co.* (1876), 2 Ch. D. 763, C. A.; *Jennings* v. *Hammond* (1882), 9 Q. B. D. 225, approved in *Shaw* v. *Benson* (1883), 11 Q. B. D. 563, C. A.; and see title COMPANIES, Vol. V.

(*z*) *Bartlett* v. *Vinor* (1692), Carth. 251, 1 Smith, L. C., 11th ed., 388; *Cope* v. *Rowlands* (1836), 2 M. & W. 149; *Smith* v. *Mawhood* (1845), 14 M. & W. 452; *Melliss* v. *Shirley Local Board* (1885), 16 Q. B. D. 446, C. A.; *Victorian Daylesford Syndicate, Ltd.* v. *Dott*, [1905] 2 Ch. 624, at p. 630, *per* BUCKLEY, J.

(*a*) *Johnson* v. *Hudson* (1809), 11 East, 180; *Brown* v. *Duncan* (1829), 10 B. & C. 93; *Wetherell* v. *Jones* (1832), 3 B. & Ad. 221; *Smith* v. *Mawhood, supra*; *Learoyd* v. *Bracken*, [1894] 1 Q. B. 114, C. A.

(*b*) *Booth* v. *Hodgson* (1795), 6 Term Rep. 405 (illegal partnership for insurance); *Lightfoot* v. *Tenant* (1796), 1 Bos. & P. 551 (shipment of goods contrary to statutory prohibition); *Ribbans* v. *Crickett* (1798), 1 Bos. & P. 264; *Law* v. *Hodson* (1809), 11 East, 300 (bricks for sale required to be of certain size); *Langton* v. *Hughes* (1813), 1 M. & S. 593 (sale of drugs to be used in brewing); *Marchant* v. *Evans* (1818), 2 Moore (C. P.), 14; *Cannan* v. *Bryce* (1819), 3 B. & Ald. 179 (stock jobbing transactions); *Bensley* v. *Bignold* (1822), 5 B. & Ald. 335 (printer's name to be affixed to work); *Little* v. *Poole* (1829), 9 B. & C. 192 (delivery of ticket by vendor of coals); *R.* v. *Gravesend* (*Inhabitants*) (1832), 3 B. & Ad. 240 (restrictions on taking of apprentices by watermen); *Forster* v. *Taylor* (1834), 5 B. & Ad. 887 (marking of vessels containing butter for sale); *Cope* v. *Rowlands* (1836), 2 M. & W. 149 (unlicensed broker); *Fergusson* v. *Norman* (1838), 6 Scott, 794 (regulations as to pawnbrokers); *Cundell* v. *Dawson* (1847), 4 C. B. 376 (ticket on sale of coals); *Taylor* v. *Crowland Gas and Coke Co.* (1854), 10 Exch. 293 (unqualified person acting as conveyancer); *Victorian Daylesford Syndicate, Ltd.* v. *Dott*, [1905] 2 Ch. 624 (unregistered money-lender).

(*c*) Sunday Observance Act, 1677 (29 Car. 2, c. 7), s. 1. There is an exception provided by s. 3 of the Act in respect of preparing and cooking meat for "such as otherwise cannot be provided," as to which see *Bullen* v. *Ward* (1905), 74 L. J. (K. B.) 916. See also title TIME.

the statute is to render void any contract entered into on Sunday by any person to whom the statute applies if the contract is made in the exercise of his ordinary calling (*d*). But the words "other person whatsoever" mean other person *ejusdem generis* with the classes of persons specified (*e*), and do not extend, for instance, to a hairdresser (*f*), the proprietor of a stage coach (*g*), or a farmer, even though he works with his own hands (*h*).

Sunday trading.

Sunday trading is not illegal at common law, nor is it prohibited by the statute except where it is in the ordinary calling of the person trading (*i*). It follows that a contract made on Sunday is not avoided unless it is made in the ordinary course of the trade or business of one of the parties (*j*). Baking puddings and pies is not an exercise of the ordinary calling of a baker (*k*), but baking or selling bread is (*l*). It is not in the ordinary course of a tradesman's business to give a guarantee to another tradesman for the fidelity of a traveller (*m*).

A contract is not avoided by the statute unless it is wholly made, or at all events completed, on Sunday (*n*), and a contract which is void because made on Sunday is a valid and sufficient consideration for a new promise made on a subsequent day (*o*). A defendant will not be permitted to set up his own breach of the statutory provisions in order to avoid his contract, unless he can show that the plaintiff was aware of the illegality (*p*).

(2) *Contracts declared by Statute to be void.*

Gaming contracts.

835. Contracts by way of gaming or wagering are declared by statute to be void (*q*); and a promise to pay any person any sum of money paid by him under or in respect of any such contract, or to pay any sum by way of commission, fee, reward, or otherwise

(*d*) *Fennell* v. *Ridler* (1826), 5 B. & C. 406; *Smith* v. *Sparrow* (1827), 4 Bing. 84; *Simpson* v. *Nicholls* (1838), 3 M. & W. 240.

(*e*) *R.* v. *Cleworth* (1864), 4 B. & S. 927.

(*f*) *Palmer* v. *Snow*, [1900] 1 Q. B. 725. But the statute applies to barbers so far as concerns the business of shaving customers: see *Phillips* v. *Innes* (1837), 4 Cl. & Fin. 234, H. L.

(*g*) *Sandiman* v. *Breach* (1827), 7 B. & C. 96.

(*h*) *R.* v. *Cleworth* (1864), 4 B. & S. 927.

(*i*) *Drury* v. *Defontaine* (1808), 1 Taunt. 131.

(*j*) *Scarfe* v. *Morgan* (1838), 4 M. & W. 270; *Peate* v. *Dickens* (1834), 3 Dowl. 171 (not in the ordinary course of a solicitor's business to become personally responsible for a client's debts); *R.* v. *Whitnash* (*Inhabitants*) (1827), 7 B. & C. 596 (hiring of labourer by farmer not within the statute).

(*k*) *R.* v. *John Younger* (1793), 5 Term Rep. 449.

(*l*) *Ibid.* See also as to baking and selling bread, 3 Geo. 4, c. cvi.; Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 14; *R.* v. *Bros* (1901), 85 L. T. 581 (Jewish baker); *R.* v. *Mead*, [1902] 2 K. B. 212; and title FOOD AND DRUGS.

(*m*) *Norton* v. *Powell* (1842), 4 Man. & G. 42. See also title TIME.

(*n*) *Ibid.* (contract signed on Sunday and delivered on Monday); *Beaumont* v. *Brengeri* (1847), 5 C. B. 301.

(*o*) *Williams* v. *Paul* (1830), 6 Bing. 653.

(*p*) *Bloxsome* v. *Williams* (1824), 3 B. &C. 232 (horse dealer sued for breach of warranty); *Smith* v. *Sparrow* (1827), 4 Bing. 84 (plaintiff aware of illegality).

(*q*) Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18; and see title GAMING AND WAGERING.

SECT. 3. Sources of Illegality.

in respect of any such contract, or of any services in relation thereto or in connection therewith, is also void (*r*).

Pensions.

An assignment of or charge on a police constable's pension (*s*) or an old age pension (*t*), and any agreement to assign or charge either of them, is declared by statute to be void.

Wagering policies.

A policy of insurance on any person's life, or on any other event in which the person for whose benefit the policy is made has no insurable interest, is a wagering contract, and is declared by statute to be void (*u*), as are policies of marine insurance, interest or no interest (*a*).

Tippling.

Certain contracts for the sale on credit of intoxicating liquors to be consumed on the premises where sold are in effect avoided by statute (*b*).

Bank shares.

A contract for the sale of joint-stock bank shares which does not specify the numbers of the shares or name of the registered proprietor is declared by statute to be void (*c*).

Contracting out.

836. As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy (*d*). In certain cases, however, the legislature has expressly provided that any such contract shall be void. The following are instances in which contracting out is precluded by the provisions of the statute by which the rights are conferred:—An agreement made between landlord and tenant for the payment of rent in full without deducting the landlord's property tax (*e*); an agreement by which an occupier of land is divested of his right to kill ground game (*f*); a stipulation by which a lessee is deprived of his right to apply for relief against forfeiture for breach of covenant (*g*); a contract by a tenant for life not to exercise any of his powers under the Settled Land Act, 1882 (*h*); an agreement by which a tenant is deprived of his right to freedom of cropping and disposal of the produce of his holding

(*r*) Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1. See title GAMING AND WAGERING.

(*s*) Police Act, 1890 (53 & 54 Vict. c. 45), s. 7, except so far as made for the benefit of the family of the pensioner.

(*t*) Old Age Pensions Act, 1908 (8 Edw. 7, c. 40), s. 6.

(*u*) Life Assurance Act, 1774 (14 Geo. 3, c. 48), s. 1; and see title INSURANCE.

(*a*) Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 4.

(*b*) Sale of Spirits Act, 1750 (24 Geo. 2, c. 40), s. 12, as amended by the Sale of Spirits Act, 1862 (25 & 26 Vict. c. 38), and by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 182. See title INTOXICATING LIQUORS.

(*c*) Banking Companies Act, 1867 (30 & 31 Vict. c. 29). See *Neilson* v. *James* (1882), 9 Q. B. D. 546, C. A.; *Seymour* v. *Bridge* (1885), 14 Q. B. D. 460; *Perry* v. *Barnett* (1885), 15 Q. B. D. 388, C. A.; *Coates, Son & Co.* v. *Pacey* (1892), 8 T. L. R. 474, C. A.; and title STOCK EXCHANGE.

(*d*) *Griffiths* v. *Dudley* (*Earl*) (1882), 9 Q. B. D. 357.

(*e*) Income Tax Act, 1842 (5 & 6 Vict. c. 35), ss. 73, 103. See title INCOME TAX.

(*f*) Ground Game Act, 1880 (43 & 44 Vict. c. 47), s. 3, and see Ground Game (Amendment) Act, 1906 (6 Edw. 7, c. 21), s. 3, and title GAME.

(*g*) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14 (9). See title LANDLORD AND TENANT.

(*h*) 45 & 46 Vict. c. 38, s. 50. See title REAL PROPERTY AND CHATTELS REAL.

or to compensation under the Agricultural Holdings Act, 1908, except in so far as that Act permits compensation to be substituted by agreement (*i*); a contract made between an occupier and an owner of lands for the payment of the tithe rent-charge by the occupier (*k*); a contract by which a workman is deprived of his right to compensation for injuries under the Workmen's Compensation Act, 1906 (*l*), except in the case of a scheme certified by the Registrar of Friendly Societies under that Act.

(3) *Statutory Regulation of Professions and Trades.*

Regulation of professions and trades.

837. Many professions, trades, and businesses are regulated by statute, and are subject to certain statutory restrictions as to the persons by whom or the manner in which they may be exercised or carried on (*m*). Thus, medical and surgical practitioners, apothecaries, dentists, and veterinary surgeons are required to be registered, and cannot recover any charges for professional services rendered by them unless they are registered in the manner prescribed by statute (*n*). Solicitors are required to be enrolled, and no solicitor can recover any charges for work done by him as a solicitor unless he holds a certificate authorising him to practise as a solicitor (*o*).

Among the trades or businesses which can only be carried on by persons who hold a licence or certificate or are registered in the manner prescribed by statute are those of auctioneers (*p*), hawkers, pedlars (*q*), pawnbrokers (*r*), money-lenders (*a*), and midwives (*b*). Intoxicating liquors (*c*), tobacco and snuff (*d*), and game (*e*) can only be sold by persons who are licensed to sell them. Poisons can only be sold by duly registered chemists and in the manner prescribed by statutory regulations (*f*).

(*i*) Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), ss. 5, 10, 11, 26; see also Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 Vict. c. 26), s. 5; and see title AGRICULTURE, Vol. I., p. 262.

(*k*) Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 1. See title LANDLORD AND TENANT.

(*l*) 6 Edw. 7, c. 58, s. 3. See title MASTER AND SERVANT.

(*m*) As to the statutory regulation of trades in general, see title TRADE AND TRADE UNIONS.

(*n*) Apothecaries Act, 1815 (55 Geo. 3, c. 194), s. 21; Medical Act, 1858 (21 & 22 Vict. c. 90), s. 32; Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 5; Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), s. 17. See title MEDICINE AND PHARMACY.

(*o*) Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 26. See title SOLICITORS.

(*p*) Auctioneers Act, 1845 (8 & 9 Vict. c. 15), s. 4. See title AUCTION AND AUCTIONEERS, Vol. I., p. 439.

(*q*) See title MARKETS AND FAIRS.

(*r*) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 37. See title PAWNBROKERS AND PLEDGES.

(*a*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2. See title MONEY AND MONEY LENDING.

(*b*) Midwives Act, 1902 (2 Edw. 7, c. 17), s. 1. See title PUBLIC HEALTH ETC.

(*c*) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3. See title INTOXICATING LIQUORS.

(*d*) See title REVENUE.

(*e*) Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 18. See title GAME.

(*f*) Poison and Pharmacy Act, 1908 (8 Edw. 7, c. 55). See title MEDICINE AND PHARMACY.

SECT. 3.
Sources of Illegality.

Sale of bread, coal, old metal.
Currency.
Weights and measures.

838. Statutory provisions regulate the manner in which bread, coal, and old metal may be sold (*g*). The name of the printer is required by statute to be written or printed on any paper printed for reward, and if this requirement is not complied with the price of the printing cannot be recovered (*h*). Every contract or transaction involving the payment of any money in the United Kingdom must be made in legal currency and not otherwise (*i*); and every contract for work to be done or goods to be sold or carried by weight or measure in the United Kingdom must be made according to the imperial weights or measures established by statute (*k*).

SUB-SECT. 3.—*Illegality supervening after Contract made.*

Subsequent illegality.

839. Where the performance of a contract, which was legal at the time when the contract was made, has been rendered illegal by a subsequent Act of Parliament, the parties are as a rule excused from further performance of the contract, because they are presumed to have contracted with reference to the law as existing at the time when the contract was made (*l*).

SUB-SECT. 4.—*Illegality under Foreign Law.*

Illegality under foreign law.

840. A contract made abroad which is to be performed in this country will not be enforced here if it is contrary to public policy according to English law, even though it may be valid according to the law of the country where it was made (*m*). But a contract which is regarded as contrary to public policy by the law of the foreign country where it was made will be enforced here if it is valid according to English law (*n*).

Performance abroad.

In the case of a contract which is to be performed abroad, the fact that it is illegal according to English law will not prevent its enforcement here if it is legal according to the law of the country where it is to be performed (*o*), unless it is contrary to morality or to the principles of natural justice (*p*).

(*g*) Bread Act, 1836 (6 & 7 Will. 4, c. 37), ss. 4, 6; Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), ss. 20—31; Old Metal Dealers Act, 1861 (24 & 25 Vict. c. 110), s. 8; Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 13. See titles FOOD AND DRUGS; WEIGHTS AND MEASURES; CRIMINAL LAW AND PROCEDURE.

(*h*) Newspapers, Printers and Reading Rooms Repeal Act, 1869 (32 & 33 Vict. c. 24), s. 1; *Bensley* v. *Bignold* (1822), 5 B. & Ald. 335. See title PRESS AND PRINTING.

(*i*) Coinage Act, 1870 (33 & 34 Vict. c. 10), s. 6. See title CONSTITUTIONAL LAW, Vol. VI., p. 461.

(*k*) Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 19, and Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 6. See title WEIGHTS AND MEASURES.

(*l*) See p. 431, *post*; *Eyre* v. *Shelley* (1840), 6 M. & W. 269; *Re Sweeting*, [1898] 1 Ch. 268.

(*m*) *Hope* v. *Hope* (1857), 8 De G. M. & G. 731, C. A.; *Grell* v. *Levy* (1864), 16 C. B. (N. S.) 73; *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351.

(*n*) *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321, C. A.

(*o*) *Santos* v. *Illidge* (1860), 8 C. B. (N. S.) 861, Ex. Ch.; *Saxby* v. *Fulton* (1908), 99 L. T. 92, affirmed in C. A. (1909), 25 T. L. R. 446.

(*p*) *Kaufman* v. *Gerson*, [1904] 1 K. B. 591, C. A. See further on this subject, title CONFLICT OF LAWS, Vol. VI., p. 232.

SECT. 4.—*Statutory Confirmation of Void Contracts.*

SECT. 4. Statutory Confirmation of Void Contracts.

841. In some cases, especially in the case of working agreements between railway companies, an agreement which would otherwise be invalid is scheduled to a local and personal Act of Parliament, by which it is confirmed and declared to be valid and binding upon the parties to it (*q*). The effect of such a provision is not merely to give the parties capacity to enter into an agreement which would otherwise be *ultra vires* or invalid, but to make the agreement itself valid *in toto*, for every clause of the agreement has statutory validity (*r*).

Confirmation of void contracts.

Where an Act of Parliament not merely confirms a scheduled agreement, but requires the parties to carry it out, the agreement becomes a statutory obligation, and is to be read as if its provisions were contained in a section of the Act (*s*).

SECT. 5.—*Incidents of Illegal Contracts.*

842. Where there is nothing on the face of a contract to show that it is illegal, extrinsic evidence is admissible to prove the illegality either of the consideration for the promise or of the purpose for which the contract was made, even if the contract is under seal (*a*).

Extrinsic evidence.

843. Where any part of the consideration for a promise or promises contained in the contract is unlawful, the whole agreement is void, for it is impossible to discriminate between the weight to be given to different parts of the consideration, and the lawful part cannot be severed from that which is unlawful (*b*).

Unlawful consideration.

(*q*) See, for example, *Jonas* v. *St. Dunstan-in-the-West Overseers* (1908), 72 J. P. 157, C. A., and the cases cited in the following notes.

(*r*) *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37, C.A., affirming FARWELL, J., [1900] 2 Ch. 352. But the mere fact that an invalid agreement is referred to in a subsequent Act of Parliament by way of recital is not in itself sufficient to give statutory validity to the agreement where the Act contains no express confirmation of it (*Kent Coast Rail. Co.* v. *London, Chatham, and Dover Rail. Co.* (1868), 3 Ch. App. 656). Where a tenant for life of settled land entered into an agreement to sell it under the Settled Land Acts at a price to be fixed by valuation, and the agreement was confirmed and made binding on the parties to it by a private Act of Parliament, it was held that the agreement, which but for the Act of Parliament would have been a breach of trust, was binding upon all parties interested in the settled land, even though they were not mentioned in the Act (*Re Wilton's (Earl) Settled Estates*, [1907] 1 Ch. 50).

(*s*) *Caledonian Rail. Co.* v. *Greenock and Wemyss Bay Rail. Co.* (1874), L. R. 2 Sc. & Div. 347; *Great Western Rail. Co.* v. *Halesowen Rail. Co.* (1883), 52 L. J. (Q. B.) 473; *R.* v. *Midland Rail. Co.* (1887), 19 Q. B. D. 540.

(*a*) *Collins* v. *Blantern* (1767), 2 Wils. 341; 1 Smith, L. C., 11th ed., 369; *Gas Light and Coke Co.* v. *Turner* (1840), 6 Bing. (N. C.) 324, Ex. Ch.; *Benyon* v. *Nettlefold* (1850), 3 Mac. & G. 94.

(*b*) *Featherston* v. *Hutchinson* (1590), Cro. Eliz. 199; *Scott* v. *Gillmore* (1810), 3 Taunt. 226; *Shackell* v. *Rosier* (1836), 2 Bing. (N. C.) 634; *Jones* v. *Waite* (1839), 5 Bing. (N. C.) 341, Ex. Ch.; *Hopkins* v. *Prescott* (1847), 4 C. B. 578; *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549; *Lound* v. *Grimwade* (1888), 39 Ch. D. 605; *Kearney* v. *Whitehaven Colliery Co.*, [1893] 1 Q. B. 700, C. A.; *Kershaw* v. *Evans* (1906), 51 Sol. Jo. 27, C. A.; *Moulis* v. *Owen*, [1907] 1 K. B. 746, C. A., per COLLINS, M.R., at p. 753; *Browne* v. *Bailey* (1908), 24 T. L. R. 644.

SECT. 5. Incidents of Illegal Contracts.

Partial illegality.

844. Where a contract consists of several promises some of which are legal and others illegal, and there is no illegality in the consideration, the promises which are in themselves legal are not contaminated by the illegality of the others and can be enforced, unless the promises are inseparable from and dependent upon one another (*c*).

Parties *in pari delicto*.

845. No action can be brought for the purpose of enforcing an illegal contract either directly or indirectly (*d*), or of recovering a share of the proceeds of an illegal transaction, by any of the parties to it (*e*). Where the object of a contract is illegal the whole transaction is tainted with illegality, and no right of action exists in respect of anything arising out of the transaction (*f*). In such a case the maxim *In pari delicto, potior est conditio defendentis* applies, and the test for determining whether an action lies is to see whether the plaintiff can make out his claim without relying on the illegal transaction to which he was a party (*g*).

Illegality as a defence.

The illegality of a contract may be set up by way of defence to an action on the contract, even if it does not appear on the face of the contract (*h*); but in order to obtain relief in equity by getting the contract set aside, the applicant must prove, not only that the contract was illegal, but that he was induced to enter into it by pressure or undue influence (*i*).

Equitable relief.

Where money has been advanced by a money-lender otherwise than in his registered name (*k*), the borrower is entitled to a declaration that the transaction is void, without being put on terms to

(*c*) 1 Wms. Saund. 85; *Pigot's Case* (1614), 11 Co. Rep. 26 b, 27 b; *Harrington* v. *Kloprogge* (1785), 2 Brod. & Bing. 678, n.; *Mouys* v. *Leake* (1799), 8 Term Rep. 411; *Gaskell* v. *King* (1809), 11 East, 165; *Wigg* v. *Shuttleworth* (1810), 13 East, 87; *Howe* v. *Synge* (1812), 15 East, 440; *Newman* v. *Newman* (1815), 4 M. & S. 66; *M'Allen* v. *Churchill* (1826), 11 Moore (C. P.), 483; *Gibbons* v. *Hooper* (1831), 2 B. & Ad. 734; *Biddell* v. *Leeder* (1823), 1 B. & C. 327; *Kerrison* v. *Cole* (1807), 8 East, 231; *Payne* v. *Brecon Corporation* (1858), 3 H. & N. 572; *Pickering* v. *Ilfracombe Rail. Co.* (1868), L. R. 3 C. P. 235, *per* WILLES, J., at p. 250; *Odessa Tramways Co.* v. *Mendel* (1878), 8 Ch. D. 235, C. A., at p. 243; *Re Burdett, Ex parte Byrne* (1888), 20 Q. B. D. 310, C. A.; *B.* v. *B.* (1892), 8 T. L. R. 636; *Kearney* v. *Whitehaven Colliery Co.*, [1893] 1 Q. B. 700, C. A.; *Re Isaacson, Ex parte Mason*, [1895] 1 Q. B. 333; *Baker* v. *Hedgecock* (1888), 39 Ch. D. 520; *United Shoe Machinery Co. of Canada* v. *Brunet* (1909), 25 T. L. R. 442, P. C. See also the decisions relating to covenants in restraint of trade, which are cited under title TRADE AND TRADE UNIONS.

(*d*) *Thomson* v. *Thomson* (1802), 7 Ves. 470; *Taylor* v. *Bowers* (1876), 1 Q. B. D. 291, C. A.; *Scott* v. *Macnaghten* (1908), *Times*, November 25.

(*e*) *Sykes* v. *Beadon* (1879), 11 Ch. D. 170.

(*f*) *Smith* v. *White* (1866), L. R. 1 Eq. 626.

(*g*) *Simpson* v. *Bloss* (1816), 7 Taunt. 246; *Fivaz* v. *Nicholls* (1846), 2 C. B. 501; *A.-G.* v. *Hollingworth* (1857), 2 H. & N. 416, at p. 423; *Taylor* v. *Chester* (1869), L. R. 4 Q. B. 309; *Taylor* v. *Bowers* (1876), 1 Q. B. D. 291, C. A.; *Begbie* v. *Phosphate Sewage Co.* (1875), L. R. 10 Q. B. 491, affirmed (1876) 1 Q. B. D. 679, C. A. See p. 486, *post*, as to when money received under an illegal contract can be claimed by another person as having been received to his use.

(*h*) *Holman* v. *Johnson* (1775), 1 Cowp. 341; *Re Cork and Youghal Rail. Co.* (1869), 4 Ch. App. 748; *Jones* v. *Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173, C. A., *per* LINDLEY, L.J., at p. 181.

(*i*) *Williams* v. *Bayley* (1866), L. R. 1 H. L. 200; *Ayerst* v. *Jenkins* (1873), L. R. 16 Eq. 275; *McClatchie* v. *Haslam* (1891), 65 L. T. 691, C. A.; *Jones* v. *Merionethshire Permanent Benefit Building Society, supra*.

(*k*) Money-lenders Act, 1900 (63 & 64 Vict. c. 51) s. 2 (1) (c). See title MONEY AND MONEY LENDING.

repay the amount received by him (*l*); but he cannot obtain relief in an equitable action to recover securities mortgaged by him to the money-lender except upon condition of repaying the money which was advanced upon them (*m*).

Money paid.

846. Money paid or goods delivered in pursuance of an illegal contract can be recovered from the other party so long as the contract remains executory (*n*), provided that notice is given repudiating the contract before the action is brought (*o*); and money deposited with a stakeholder to abide the event of such a contract can be recovered from him if notice is given at any time before he has paid it over in pursuance of the contract (*p*). If, however, the illegal purpose has been carried out or a substantial part of the contract has been performed, money paid under the contract can no longer be recovered (*q*), except where it appears that the parties were not *in pari delicto*, for instance, where the plaintiff shows that he was induced to enter into the contract by fraud, duress, or oppression on the part of the defendant, or that a fiduciary relationship existed between the parties which renders it inequitable for the defendant to insist upon the bargain that he made with the plaintiff (*r*), or where the contract is made illegal by

(*l*) *Chapman* v. *Michaelson*, [1908] 2 Ch. 612.

(*m*) *Scott* v. *Nesbit* (1789), 2 Bro. C. C. 640; *Mason* v. *Gardiner* (1793), 4 Bro. C. C. 436; *Lodge* v. *National Union Investment Co., Ltd.*, [1907] 1 Ch. 300. Whether the securities could be recovered in a common law action of detinue or trover without the imposition of such terms is still an open question (see *Fitzroy* v. *Gwillim* (1786), 1 Term Rep. 153; *Hindle* v. *O'Brien* (1809), 1 Taunt. 413; *Roberts* v. *Goff* (1820), 4 B. & Ald. 92; *Tregoning* v. *Attenborough* (1830), 7 Bing. 97; *Hargreaves* v. *Hutchinson* (1834), 2 Ad. & El. 12; *Lodge* v. *National Union Investment Co., Ltd.*, *supra*). See title MONEY AND MONEY LENDING.

(*n*) *Tappenden* v. *Randall* (1801), 2 Bos. & P. 467; *Bone* v. *Ekless* (1860), 5 H. & N. 925; *Symes* v. *Hughes* (1875), L. R. 9 Eq. 475; *Taylor* v. *Bowers* (1876), 1 Q. B. D. 291, C. A.; *Herman* v. *Jeuchner* (1885), 16 Q. B. D. 561, C. A.; *Kearley* v. *Thompson* (1890), 24 Q. B. D. 742, C. A.; *Hermann* v. *Charlesworth*, [1905] 2 K. B. 123, C. A.

(*o*) *Busk* v. *Walsh* (1812), 4 Taunt. 290; *Palyart* v. *Leckie* (1817), 6 M. & S. 290.

(*p*) *Hastelow* v. *Jackson* (1828), 8 B. & C. 221; *Hodson* v. *Terrill* (1833), 1 Cr. & M. 797; *Barclay* v. *Pearson*, [1893] 2 Ch. 154. See further, as to the right to recover from a stakeholder a deposit made on a wager, title GAMING AND WAGERING.

(*q*) *Collins* v. *Blantern* (1767), 2 Wils. 341; 1 Smith, L. C., 11th ed., 369; *Lowry* v. *Bourdieu* (1780), 2 Doug. (K. B.) 468; *Goodall* v. *Lowndes* (1844), 6 Q. B. 464; *Taylor* v. *Chester* (1869), L. R. 4 Q. B. 309; *Ayerst* v. *Jenkins* (1873), L. R. 16 Eq. 275; *Begbie* v. *Phosphate Sewage Co.* (1875), L. R. 10 Q. B. 491; affirmed (1876) 1 Q. B. D. 679, C. A.; *Re Mapleback, Ex parte Caldecott* (1876), 4 Ch. D. 150, C. A.; *Re Great Berlin Steamboat Co.* (1884), 26 Ch. D. 616, C. A.; *Herman* v. *Jeuchner* (1885), 15 Q. B. D. 561, C. A.; *Howard* v. *Refuge Friendly Society* (1886), 54 L. T. 644; *Kearley* v. *Thomson*, *supra*; *Scott* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A.; *Apthorp* v. *Neville & Co.* (1907), 23 T. L. R. 575.

(*r*) *Smith* v. *Cuff* (1817), 6 M. & S. 160; *Horton* v. *Riley* (1843), 11 M. & W. 492; *Higgins* v. *Pitt* (1849), 4 Exch. 312; *Reynell* v. *Sprye* (1852), 1 De G. M. & G. 660, at p. 679; *Atkinson* v. *Denby* (1862), 7 H. & N. 934, Ex. Ch.; *Re Lenzberg's Policy* (1877), 7 Ch. D. 650; *Kearley* v. *Thomson*, *supra*; *British Workman's and General Assurance Co.* v. *Cunliffe* (1902), 18 T. L. R. 502, C. A.; *Harse* v. *Pearl Life Assurance Co.*, [1904] 1 K. B. 558, C. A.; *Kettlewell* v. *Refuge Assurance Co.*, [1908] 1 K. B. 545, C. A., affirmed in H. L. (1909), 25 T. L. R. 395.

SECT. 5. Incidents of Illegal Contracts.

statute with the object of protecting a particular class of persons to which the plaintiff belongs (*a*).

Security for debt.

847. A security which is given in respect of a debt arising out of an illegal transaction is tainted with illegality, and cannot be enforced, whether it is under seal or not, if it was taken by a person who knew, or ought to have known, of the illegality (*b*); but in the case of a contract which is merely void and not illegal, a security given for payment of a debt arising out of the contract is in the same position as any other promise which is made without consideration, and if it is under seal it can be enforced (*c*).

Part V.—Discharge of Contract.

How contract discharged.

848. There are three modes in which a contract may be discharged—(1) by performance, where all that the promisor undertook to do has been performed; (2) in certain cases where the promisor is excused by law from performing his promise; (3) by breach, where the promisor has failed to perform his promise.

SECT. 1.—*Performance.*

SUB-SECT. 1.—*By whom Contract must be performed.*

Personal contracts.

849. Where the contract is of such a nature that no personal skill or superintendence on the part of the promisor is required for its performance, it may as a rule be performed either by the promisor himself or by some other person nominated by him for the purpose (*d*); but where the personality of the promisor is or may be of importance, for instance, where an element of personal skill or confidence is involved, the performance must be effected by

(*a*) *Browning* v. *Morris* (1778), 2 Cowp. 790; *Kearley* v. *Thomson* (1890), 24 Q. B. D. 742, C. A.; *Barclay* v. *Pearson*, [1893] 2 Ch. 154; *Lodge* v. *National Union Investment Co., Ltd.*, [1907] 1 Ch. 300.

(*b*) *Cuthbert* v. *Haley* (1799), 8 Term Rep. 390; *Walker* v. *Perkins* (1764), 1 Wm. Bl. 517; *Cannan* v. *Bryce* (1819), 3 B. & Ald. 179; *Amory* v. *Meryweather* (1824), 2 B. & C. 573; *Prole* v. *Wiggins* (1836), 3 Scott, 601; *Benyon* v. *Nettlefold* (1850), 3 Mac. & G. 94; *Fisher* v. *Bridges* (1854), 3 E. & B. 642, Ex. Ch.; *Geere* v. *Mare* (1863), 2 H. & C. 339; *Clay* v. *Ray* (1864), 17 C. B. (N. S.) 188; *Taylor* v. *Chester* (1869), L. R. 4 Q. B. 309; *Jennings* v. *Hammond* (1882), 9 Q. B. D. 225; *Shaw* v. *Benson* (1883), 11 Q. B. D. 563, C. A.; *Kershaw* v. *Evans* (1906), 51 Sol. Jo. 27, C. A. Securities given in respect of bets on games (which includes horse-racing) are to be deemed to have been given for an illegal consideration (9 Ann. c. 19, (c. 14, Ruff.); Gaming Act, 1835 (5 & 6 Will. 4, c. 41), s. 1). See *Universal Stock Exchange, Ltd.* v. *Strachan*, [1896] A. C. 166; *The Cronmire, Ex parte Waud*, [1898] 2 Q. B. 383, C. A.; and title GAMING AND WAGERING. As to the rights of a holder in due course where the security given is a negotiable instrument, see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 500.

(*c*) *Gray* v. *Mathias* (1800), 5 Ves. 286; *Nye* v. *Moseley* (1826), 6 B. & C. 133; *Wynne* v. *Callander* (1826), 1 Russ. 293; *Fitch* v. *Jones* (1855), 5 E. & B. 238; *Yorkshire Railway Wagon Co.* v. *Maclure* (1881), 19 Ch. D. 478; *Re Vallance, Vallance* v. *Blagden* (1884), 26 Ch. D. 353.

(*d*) *British Waggon Co.* v. *Lea* (1880), 5 Q. B. D. 149.

the promisor personally, and the other party is entitled to object to the contract being performed by any other person (*e*).

In the case of a joint promise each of the promisors is liable as between himself and the promisee to perform the whole of the contract (*f*), though he is entitled, if he is sued on the contract, to have the other promisors joined as defendants (*g*). Joint promises.

SUB-SECT. 2.—*Mode of Performance.*

850. The question whether what has been done amounts to a performance of the contract is a question in each case of the construction of the terms of the contract (*h*). The promisor is not entitled to substitute for what he has promised something else which is equally advantageous to the promisee (*i*). The parties may, however, by express agreement or waiver substitute a different mode of performance for that originally agreed on (*j*). Mode of performance.

In the case of an alternative promise (that is, a promise to do one of two or more things), if the contract does not state which Alternative promises.

(*e*) *Schmaling* v. *Thomlinson* (1815), 6 Taunt. 147 (transport of goods to foreign market); *Robson* v. *Drummond* (1831), 2 B. & Ad. 303 (agreement by coachmaker to supply carriage for a term of years); *Boulton* v. *Jones* (1857), 2 H. & N. 564 (sale of goods); *Jaeger's (Dr.) Sanitary Woollen System Co., Ltd.* v. *Walker & Sons* (1897), 77 L. T. 180, C. A.; *Griffith* v. *Tower Publishing Co., Ltd. and Moncrieff*, [1897] 1 Ch. 21 (agreement between author and publisher); *Lucas* v. *Moncrieff* (1905), 21 T. L. R. 683 (author and publisher). Compare *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), [1903] A. C. 414, and *Russell & Co., Ltd.* v. *Austin Fryers* (1909), 25 T. L. R. 414. See also p. 431, *post*. Where the other party has a claim which he is entitled to set off against his liability under the contract, it has been said that he is entitled to insist upon the contract being performed by the promisor personally (*Boulton* v. *Jones*, *supra*, *per* BRAMWELL, B.).

(*f*) *Richards* v. *Heather* (1817), 1 B. & Ald. 29; *Mountstephen* v. *Brooke* (1818), 1 B. & Ald. 224; *King* v. *Hoare* (1844), 13 M. & W. 494, at p. 505. See p. 336, *ante*; and as to the liability of the survivors after the death of any of the joint promisors, see p. 337, *ante*.

(*g*) *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504; *Pilley* v. *Robinson* (1887), 20 Q. B. D. 155; R. S. C., Ord. 16, r. 11. See p. 336, *ante*; and as to the right of one joint promisor to contribution from the others, see p. 471, *post*.

(*h*) *Penniall* v. *Harborne* (1848), 11 Q. B. 368 (covenant to insure from time to time and at all times held broken by leaving a part uninsured for two months after execution of the lease, though no loss was suffered); *Richardson* v. *Barnes* (1849), 4 Exch. 128 (agreement to give lease of a term which had expired held not satisfied by delivery of the lease with the seal torn off); *Doe* d. *Muston* v. *Gladwin* (1845), 6 Q. B. 953 (covenant by lessee to insure in joint names of himself and lessor not fulfilled by insurance in name of lessee only; compare *Havens* v. *Middleton* (1853), 10 Hare, 641); *Edmundson* v. *Longton Corporation* (1902), 19 T. L. R. 15 (payment for gas by putting money in automatic slot meter, the money being stolen without negligence). In the case of a contract for the sale of goods, if the seller delivers a quantity of goods larger or smaller than he contracted to sell, or delivers the goods mixed with goods of a different description not included in the contract, this is not a performance of the contract, and the buyer is entitled to reject the goods (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 30). See title SALE OF GOODS.

(*i*) *Legh* v. *Lillie* (1860), 6 H. & N. 165; *Forman & Co. Proprietary* v. *The Ship "Liddesdale,"* [1900] A. C. 190, P. C. Compare *Havens* v. *Middleton* (1853), 10 Hare, 641, where it was held that a covenant by a lessee to insure in the names of himself and lessor was sufficiently performed by an insurance in the name of the lessor alone, on the ground that the stipulation for the joining of the lessee was for his exclusive benefit, which he might therefore dispense with.

(*j*) See pp. 421, 423, *post*.

SECT. 1. Performance.

party is to have the option, the rule of law is that the party who has to perform the first act has the right to elect which branch of the alternative he will perform (*k*). Where the option rests with the promisee, notice must be given by him of the mode in which the option has been exercised, and the liability of the other party to perform the contract does not arise until such notice has been given (*l*). When an option has been exercised the election cannot afterwards be revoked (*m*); but a tender of performance which is not in accordance with the terms of the contract can be withdrawn, and does not preclude the promisor from subsequently making a tender of performance in a proper manner, at any rate where the first tender has been rejected by the promisee (*n*).

Where one of the things contracted for subsequently becomes impossible, it is a question of construction of the terms of the contract whether the promisor is bound to perform the alternative or is discharged altogether (*o*).

SUB-SECT. 3.—*Time of Performance.*

Where no time fixed.

851. Where no time for performance is fixed by the contract, the law implies an undertaking by each party to perform his part of the contract within what is a reasonable time having regard to the circumstances of the case (*p*).

(*k*) *Layton* v. *Pearce* (1778), 1 Doug. (K. B.) 15; *Dann* v. *Spurrier* (1803), 3 Bos. & P. 399; *Price* v. *Nixon* (1814), 5 Taunt. 338; *Re Brookman's Trust* (1869), 5 Ch. App. 182; *Reed* v. *Kilburn Co-operative Society* (1875), L. R. 10 Q. B. 264; *Tielens* v. *Hooper* (1850), 5 Exch. 830.

(*l*) *Mallam* v. *Arden* (1833), 10 Bing. 299; *Vyse* v. *Wakefield* (1840), 6 M. & W. 442, affirmed 7 M. & W. 126, Ex. Ch.; *Calaminus* v. *Dowlais Iron Co.* (1878), 47 L. J. (Q. B.) 575; *Honck* v. *Muller* (1881), 7 Q. B. D. 92, C. A.; *Thorn* v. *City Rice Mills* (1889), 40 Ch. D. 357.

(*m*) *Schneider* v. *Foster* (1857), 2 H. & N. 4; *Brown* v. *Royal Insurance Co.* (1859), 1 E. & E. 853; *Rugy* v. *Weir* (1864), 16 C. B. (N. S.) 471; *Gath* v. *Lees* (1865), 3 H. & C. 558.

(*n*) *Borrowman* v. *Free* (1878), 4 Q. B. D. 500, C. A.

(*o*) *Anderson* v. *Commercial Union Assurance Co.* (1885), 55 L. J. (Q. B.) 146, C. A., *per* BOWEN, L.J., at p. 150. As to impossibility as an excuse for the non-performance of a contract, see p. 426, *post*.

(*p*) Co. Litt. 208 a, b; *Taylor* v. *Great Northern Rail. Co.* (1866), L. R. 1 C. P. 385; *Postlethwaite* v. *Freeland* (1880), 5 App. Cas. 599; *De Waal* v. *Adler* (1886), 12 App. Cas. 141, P. C.; *Potter* v. *Deboos* (1815), 1 Stark. 82; *Harrison* v. *Cage* (1698), 1 Ld. Raym. 386; *Ford* v. *Cotesworth* (1870), L. R. 5 Q. B. 544, Ex. Ch.; *Carlton Steamship Co.* v. *Castle Mail Packets Co.*, [1898] A. C. 486; *Hick* v. *Raymond and Reid*, [1893] A. C. 22. In *Hyde* v. *Watts* (1843), 12 M. & W. 254, it was held that a covenant by a person to insure his life forthwith must be construed as a covenant to insure within a reasonable time. In *Staunton* v. *Wood* (1851), 16 Q. B. 638, where there was a contract for the delivery of goods forthwith, to be paid for in fourteen days, it was held that delivery must be made at least before the expiration of the fourteen days, the contract importing that there was to be a period of credit. The words "as soon as possible" were construed as meaning within a reasonable time in *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q. B. D. 670, C. A.; but in *Duncan* v. *Topham* (1849), 8 C. B. 225, it was held that the word "directly" imported that the act was to be done speedily, or at least as soon as practicable, and that it ought not to be construed as meaning merely within a reasonable time. As to the time for delivery of goods under a contract for sale where no time for delivery is fixed, see s. 29 (2) of Sale of Goods Act, 1893 (56 & 57 Vict. c. 71); and title SALE OF GOODS.

When time essential.

852. At common law stipulations as to time in a contract were, as a general rule, considered to be of the essence of the contract, even if they were not expressed to be so, and were construed as conditions precedent, so that in an action for damages for breach of the contract the defendant could not escape liability by showing that he had offered performance, unless the offer was made at or within the precise time specified (*q*), and, on the other hand, the plaintiff could not succeed unless he could show that he was ready and willing to perform his part of the contract at or within the time fixed for performance (*r*). But in the exercise of its jurisdiction to decree specific performance the Court of Chancery adopted the rule, especially in the case of contracts for the sale of land, that stipulations as to time were not to be regarded as of the essence of the contract unless either they were made so by express terms, or it appeared from the nature of the contract, or the surrounding circumstances, that that was the intention of the parties; and in the absence of an express stipulation, or clear indication of an intention, that time should be of the essence of the contract, specific performance would be decreed although the plaintiff had failed to complete the contract or to take the various steps towards completion by the dates specified (*s*).

Effect of Judicature Act.

853. The equitable rule now prevails, not only in actions for specific performance, but also in actions at law for damages for breach of contract, in the case of such contracts as fell within the jurisdiction of the Court of Chancery to decree specific performance (*t*); but it has no application to mercantile contracts not falling within that jurisdiction, with regard to which stipulations as to time are still *primâ facie* to be regarded as essential (*a*). There is an exception to this latter rule in the case of stipulations as to the time for payment in contracts for the sale of goods, such stipulations not being deemed to be of the essence of the contract unless a different intention appears (*b*). But stipulations as to the time for delivery of the goods are considered essential unless a contrary intention is clearly shown (*c*). Where it is provided that

(*q*) See p. 432, *post*. As to the computation of time, and the meaning of particular expressions descriptive of periods of time, see title TIME.

(*r*) *Noble* v. *Edwardes* (1877), 5 Ch. D. 378, C. A.; *Parkin* v. *Thorold* (1852), 16 Beav. 59; *Wilde* v. *Fort* (1812), 4 Taunt. 334; *Sansom* v. *Rhodes* (1840), 6 Bing. (N. C.) 261.

(*s*) *Parkin* v. *Thorold*, *supra*; *Seton* v. *Slade* (1802), 7 Ves. 265; *Roberts* v. *Berry* (1853), 3 De G. M. & G. 284, C. A.; *Tilley* v. *Thomas* (1867), 3 Ch. App. 61; *Boehm* v. *Wood* (1820), 1 Jac. & W. 419; *Nokes* v. *Kilmorey* (*Lord*) (1847), 1 De G. & Sm. 444. See, further, titles SALE OF LAND; SPECIFIC PERFORMANCE.

(*t*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (7).

(*a*) *Reuter* v. *Sala* (1879), 4 C. P. D. 239, C. A., *per* COTTON, L.J., at p. 249.

(*b*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 10 (1). As to the time for payment of bills of exchange and promissory notes, see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 476.

(*c*) *Bowes* v. *Shand* (1877), 2 App. Cas. 455 (where goods were to be shipped during March $\frac{\text{and}}{\text{or}}$ April, it was held that the buyer was entitled to reject goods shipped in February); *Reuter* v. *Sala*, *supra*

SECT. 1. Performance.

the goods shall be delivered on or before a certain day it is sufficient if they are tendered at a reasonable time on the last or any other of the days of the period specified (*d*).

Contracts relating to land.

854. In contracts subject to the equitable rule, although stipulations as to time are *primâ facie* presumed not to be of the essence of the contract, this is merely a presumption which is liable to be rebutted by a clear indication of a contrary intention, and such an intention may appear either by a direct stipulation to that effect or by implication from the nature of the subject-matter of the contract and the surrounding circumstances (*e*). A condition in a contract for the sale of land that if from any cause whatever the purchase is not completed by a certain date the vendor shall be at liberty to rescind the contract makes the time for completion essential and justifies the vendor in rescinding the contract in the event of the purchaser refusing to pay the purchase-money on the appointed day (*f*). If in a contract for the purchase of a house for the purchaser's own residence it is provided that vacant possession shall be given by a certain date, time will be considered of the essence of the contract, provided the vendor was aware that the purchaser required the premises for his own residence (*g*). The motives of the purchaser will not, however, be taken into consideration in construing stipulations as to time, unless they are expressed in the contract or were made known to the vendor (*h*).

Contracts for the sale of a reversionary interest (*i*), or of a public-house or business as a going concern (*k*), or for a lease of a working mine (*l*), are instances of contracts in which stipulations as to time will be deemed essential by implication from the nature of the subject-matter in the absence of clear indication of an intention to the contrary. A provision that the purchaser shall pay interest on the purchase-money in the event of non-completion by the day appointed is, however, a sufficient indication that the time fixed for completion was not intended to be of the essence of the contract (*m*).

Options.

An option for the renewal of a lease (*n*), or for the purchase or re-purchase of property (*o*), must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse; and a notice of an intention to exercise the option given without

(*d*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 29 (4); *Startup* v. *Macdonald* (1843), 6 Man. & G. 593, Ex. Ch.

(*e*) *Withy* v. *Cottle* (1823), Turn. & R. 78; *Carter* v. *Ely* (*Dean and Chapter*) (1835), 7 Sim. 211.

(*f*) *Hudson* v. *Temple* (1860), 29 Beav. 536.

(*g*) *Tilley* v. *Thomas* (1867), 3 Ch. App. 61; *Nokes* v. *Kilmorey* (*Lord*) (1847), 1 De G. & Sm. 444.

(*h*) *Boehm* v. *Wood* (1820), 1 Jac. & W. 419; *Nokes* v. *Kilmorey* (*Lord*), *supra*.

(*i*) *Newman* v. *Rogers* (1793), 4 Bro. C. C. 391; *Patrick* v. *Milner* (1877), 2 C. P. D. 342.

(*k*) *Cowles* v. *Gale* (1871), 7 Ch. App. 12; *Coslake* v. *Till* (1826), 1 Russ. 376; *Day* v. *Luhke* (1868), L. R. 5 Eq. 336.

(*l*) *Macbryde* v. *Weekes* (1856), 22 Beav. 533.

(*m*) *Patrick* v. *Milner*, *supra*; *Hatten* v. *Russell* (1888), 38 Ch. D. 334.

(*n*) *Nicholson* v. *Smith* (1882), 22 Ch. D. 640.

(*o*) *Dibbins* v. *Dibbins*, [1896] 2 Ch. 348; *Ranelagh* (*Lord*) v. *Melton* (1864), 2 Drew. & Sm. 278.

authority within the time limited cannot be made effective by a ratification after the time has expired (*p*).

Notice.

855. In cases where time is not originally of the essence of the contract it may be made so, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for completion and stating that, in the event of non-completion within the time so fixed, he intends to abandon the contract (*q*). But the time fixed must be reasonable having regard to the position of things at the time when the notice is given (*r*).

Extension.

856. Where time is of the essence of the contract, and is extended by agreement between the parties, the extension does not operate as an entire waiver of the condition, but merely has the effect of substituting the extended time for that originally fixed (*s*).

SUB-SECT. 4.—*Place of Performance.*

Place.

857. The place for performance of a contract, if not specified in express terms, depends upon the intention of the parties, as indicated by the nature and terms of the contract and the other circumstances of the particular case (*a*).

When specified.

Where a place for payment, or for the performance of any other act, is specified, the promisor must tender payment or performance at that place in order to discharge himself (*b*), unless the place so specified is varied by mutual consent, or performance according to the stipulation is waived (*c*); and on the other hand, if the act is

(*p*) *Dibbins* v. *Dibbins*, [1896] 2 Ch. 341.

(*q*) *Parkin* v. *Thorold* (1852), 16 Beav. 59; *Taylor* v. *Brown* (1839), 2 Beav. 180; *Benson* v. *Lamb* (1846), 9 Beav. 502.

(*r*) *Green* v. *Sevin* (1879), 13 Ch. D. 589; *Crawford* v. *Toogood* (1879), 13 Ch. D. 153. See title SALE OF LAND.

(*s*) *Barclay* v. *Messenger* (1874), 43 L. J. (CH.) 449; *Nokes* v. *Kilmorey* (*Lord*) (1847), 1 De G. & Sm. 444. Parol evidence is admissible to show that the defendant requested that the time for performance should be extended (*Hickman* v. *Haynes* (1875), L. R. 10 C. P. 598).

(*a*) *Reynolds* v. *Coleman* (1887), 36 Ch. D. 453, C. A. (contract made in England by an American to transfer shares in an English company to a person resident in England ought to be performed in England); *Thompson* v. *Palmer*, [1893] 2 Q. B. 80, C. A. (contract by civil engineer resident in England with two persons, one an Englishman and the other a foreigner resident in Spain, by which the engineer agreed to prepare drawings and superintend the construction of certain docks in Spain, which he was required to visit once in every three months, the engineer to be paid his travelling expenses and a commission on the cost of construction. It was held that payment of the expenses and commission ought to be made in England, no other place being specified). Compare *Comber* v. *Leyland*, [1898] A. C. 524; *Anger* v. *Vasnier* (1902), 18 T. L. R. 596, C. A.; and see also *Bell & Co.* v. *Antwerp, London and Brazil Line*, [1891] 1 Q. B. 103, C. A.; *Rein* v. *Stein*, [1892] 1 Q. B. 753, C. A.; *Charles Duval & Co., Ltd.* v. *Gans*, [1904] 2 K. B. 685, C. A. As to payment generally, see p. 444, *post*.

(*b*) *Cox* v. *Watson* (1877), 7 Ch. D. 196. As to discharging cargo under charterparties and bills of lading, see title SHIPPING AND NAVIGATION.

(*c*) *Leather-Cloth Co.* v. *Hieronimus* (1875), L. R. 10 Q. B. 140; *Neill* v. *Whitworth* (1866), L. R. 1 C. P. 684, Ex. Ch. Where a consignor directs a carrier to deliver goods to the consignee at a particular place, it is competent to the consignee and the carrier to change the place of delivery, and a delivery according to any such agreement with the consignee discharges the

SECT. 1. Performance.

one which cannot be done without the concurrence of the promisee, it is his duty to attend at the place fixed in order to enable the promisor to fulfil the contract (*d*). Where, in such a case, the act is to be done on or before a certain day, the promisee must be at the place of performance at such a convenient time before sunset on the day or the last of the days specified as will enable the promisor to complete the act by daylight, failing which the presence of the promisor at the place ready to perform the contract will operate as a legal tender (*e*).

Alternative places.

Where a contract specifies two or more alternative places for payment or performance, the question whether the promisor or the promisee has the right of selection depends on the intention of the parties, which is to be ascertained from the nature and terms of the contract and the surrounding circumstances (*f*). It is the duty of the party who has the right of selection to notify the other party at which of the places he intends to perform or require performance of the contract, as the case may be (*f*).

When not specified.

858. Where no place for performance is specified either expressly or by implication from the nature and terms of the contract and the surrounding circumstances, and the act is one which requires the presence of both parties for completion, the general rule is that the promisor must seek out the promisee and perform the contract wherever he may happen to be (*g*). This rule applies not only to contracts for the payment of money, but to all promises for the performance of which the concurrence of the promisee is necessary (*g*). If, however, a debtor gives notice to

contract with the consignor, unless the consignor has in the meantime stopped the goods *in transitu* (*London and North-Western Rail. Co.* v. *Bartlett* (1861), 7 H. & N. 400). See titles CARRIERS, Vol. IV., p. 1; SALE OF GOODS.

(*d*) *Startup* v. *Macdonald* (1843), 6 Man. & G. 593, Ex. Ch.; Shep. Touch. 378; *Thorn* v. *City Rice Mills* (1889), 40 Ch. D. 357 (condition in debenture for payment at time and place certain is not broken unless the creditor attends at the place specified); *Re Esculera Silver Lead Mining Co., Tweedy* v. *The Company* (1908), 25 T. L. R. 87 (similar case).

(*e*) *Startup* v. *Macdonald*, *supra*, at pp. 624, 625, *per* PARKE, B.; *Thorn* v. *City Rice Mills*, *supra*. An actual tender to the promisee, so that the act may be completed at any time before midnight, is good. See, as to tender generally, p. 417, *post*.

(*f*) In *Rippinghall* v. *Lloyd* (1833), 5 B. & Ad. 742, where a contract under seal for the sale of land contained a stipulation that if the vendor should not verify his title by the production of deeds at Norwich, Lynn, or London before a certain date the agreement should be void, it was held that the option was with the vendor, and that he was bound to give notice at which of the places he would be ready to produce his deeds. In *Thorn* v. *City Rice Mills*, *supra*, where a debenture provided that payment should be made at a specified bank or at the company's registered office, it was held that it was for the creditor to select at which of the two places he would be paid, and that there could be no default until he had made his selection and notified it to the company.

(*g*) Payment of money (*Haldane* v. *Johnson* (1853), 8 Exch. 689; *Robey* v. *Snaefell Mining Co.* (1887), 20 Q. B. D. 152; *The Eider*, [1893] P. 119, C. A.; *Thompson* v. *Palmer*, [1893] 2 Q. B. 80, C. A; *Fessard* v. *Mugnier* (1865), 18 C. B. (N. S.) 286). Covenant to produce deeds (*Rippinghall* v. *Lloyd* (1833), 5 B. & Ad. 742). Delivery of promissory notes securing a composition payable under a deed of arrangement with creditors (*Cranley* v. *Hillary* (1813), 2 M. & S.

his creditor of his intention to pay at a certain time at a convenient place, and the creditor makes no objection to the notice, he will be deemed to waive the necessity of a personal tender unless he attends at the place specified (*h*).

Promisee abroad.

The general rule applies to contracts made with persons resident abroad (*i*), but not where the promisee was in England at the time when the contract was made and subsequently went abroad before breach (*k*).

Rent.

Rent reserved without any express covenant for payment is deemed to issue out of the land, and unless a place for payment is specified in the reservation, is payable on the demised premises, the tenant being protected if he is ready to pay at the door of the principal house, or other notorious place, at a convenient time before sunset on the day the rent falls due (*l*); but if there is an express covenant to pay, the general rule applies, and the tenant is bound to seek out and pay his landlord, except for the purpose of forfeiture or distress (*m*).

SECT. 2.—*Excuses for Non-performance.*

SUB-SECT. 1.—*Tender.*

Tender.

859. In cases where the promise is capable of performance without the concurrence of the promisee, the promisor is not excused from liability by reason of the fact that performance is dependent upon the concurrence of a third person which he is unable to obtain (*a*). Where, however, a promise cannot be performed without the concurrence of the promisee (as in the case of a contract to deliver goods or to pay money), the promisor is freed from liability under the contract if he makes an unconditional tender or offer of performance in accordance with the terms of his promise and the promisee refuses to accept performance; provided that the tender is made under such circumstances that the other party has a reasonable opportunity of examining the goods or money tendered in order to ascertain that the thing tendered is what it purports to be (*b*).

120). As to the place of payment in the case of bills of exchange and promissory notes, see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., 467; and as to the place of delivery in a contract for the sale of goods (an exception to the general rule), see s. 29 (1) of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and title SALE OF GOODS.

(*h*) *Gyles* v. *Hall* (1726), 2 P. Wms. 378 (mortgage money lent in London: notice to pay it off at Lincoln's Inn Hall).

(*i*) *Fessard* v. *Mugnier* (1865), 18 C. B. (N. S.) 286 (payment under composition deed, the creditor being abroad when the debt was incurred).

(*k*) *Ibid.*; Littleton's Tenures, 340. As to the right of a creditor to require payment to be made to his account at a bank in England in such a case, see *Shrewsbury* v. *Shrewsbury* (1907), 23 T. L. R. 277.

(*l*) Co. Litt. 201 b; *Tinckler* v. *Prentice* (1812), 4 Taunt. 549; Bro. Abr. tit. Tender, pl. 41.

(*m*) *Haldane* v. *Johnson* (1853), 8 Exch. 689 (see title LANDLORD AND TENANT).

(*a*) *Doughty* v. *Neal* (1669), 1 Wms. Saund. 215. For cases in which impossibility of performance is an excuse for non-performance, see p. 426, *post*.

(*b*) *Startup* v. *Macdonald* (1843), 6 Man. & G. 593, Ex. Ch., *per* ROLFE, B.,

SECT. 2. Excuses for Non-performance.

Effect of tender.

The principle of the plea of tender is that the promisor has always been ready to perform the contract, and has in fact performed it as far as he was able, but has been prevented from completely performing it by the refusal of the promisee to accept performance. In the case of a contract for the sale of goods, the seller is freed from liability under the contract if the buyer fails to take delivery of the goods (*c*). Where, however, the promise is to pay a sum of money, the debt is not discharged by a tender of payment, but such tender, coupled with continued readiness to pay the debt, is an answer to a subsequent action for non-payment if the amount of the debt is paid into court (*d*), and operates as a bar to any claim for subsequent interest (*e*).

Demand for performance.

A plea of tender will fail if the plaintiff can show that at any time, whether before or after the tender, a demand for payment or performance was made by him and was not complied with, provided that the demand was made at a time when he had a right to make it and that he did not require payment of a greater amount than was due or performance otherwise than in accordance with the contract (*f*). But in order that the plea may be defeated by a demand made after the tender, the demand must be made by the creditor himself or by an agent previously authorised by him (*g*). An unauthorised demand cannot be made effective for this purpose by ratification (*g*).

Requisites of valid tender.

860. The amount tendered ought to be the precise amount that is due. If, however, the debtor tenders a larger amount and does not require change, it is a good tender of the amount due (*h*); but if he requires change it is not a good tender, because the creditor is not bound to give change, though he will be deemed to waive the objection if he refuses to accept the tender on some other

at p. 610; *Isherwood* v. *Whitmore* (1843), 11 M. & W. 347. A refusal to accept performance may be made in such a manner as to amount to a renunciation of the contract so as to entitle the promisor to treat the contract as at an end. See pp. 438 *et seq.*, *post*.

(*c*) *Startup* v. *Macdonald* (1843), 6 Man. & G. 593, Ex. Ch.; and see title SALE OF GOODS.

(*d*) *Dixon* v. *Clark* (1848), 5 C. B. 365; R. S. C., Ord. 22, r. 3; County Court Rules, Ord. 10, r. 20. Where money has been paid into court with a plea of tender the plaintiff may take the money out, but is not entitled to the costs of the action, because if the plea is substantiated the action ought not to have been brought (R. S. C., Ord. 22, r. 7; *Griffiths* v. *Ystradyfodwg School Board* (1890), 24 Q. B. D. 307). A plea of tender is not available where the claim is for unliquidated damages (*Dearle* v. *Barrett* (1834), 2 Ad. & El. 82; *Davys* v. *Richardson* (1888), 21 Q. B. D. 202, C. A.).

(*e*) *Norton* v. *Ellam* (1837), 2 M. & W. 461.

(*f*) *Poole* v. *Tumbridge* (1837), 2 M. & W. 223, *per* PARKE, B.; *Cotton* v. *Godwin* (1840), 7 M. & W. 147; *Brandon* v. *Newington* (1842), 3 Q. B. 915; *Hesketh* v. *Fawcett* (1843), 11 M. & W. 356; *Dixon* v. *Clark* (1848), 5 C. B. 365). In the case of a debt owed by two or more persons jointly it is sufficient if the demand is made to any one of them (*Peirse* v. *Bowles and Spibey* (1816), 1 Stark. 323). The principle that a plea of tender is not available in the case of a demand made before the tender is of no practical importance in the case of contracts to pay money, since formal pleadings were abolished by the Judicature Act, 1873 (36 & 37 Vict. c. 66).

(*g*) *Coore* v. *Callaway* (1794), 1 Esp. 115; *Coles* v. *Bell* (1809), 1 Camp. 478, n.

(*h*) *Dean* v. *James* (1833), 4 B. & Ad. 546.

ground (*i*). A tender of part of an entire debt is bad, but if the items of the claim are separable a tender may be made in respect of separate items, provided it is appropriated by the debtor to the specific items (*k*). A tender of the balance of a debt after setting off, without the consent of the creditor, the amount of a debt presently due from the creditor to the debtor, is not strictly a legal tender (*l*), though, at the present day, having regard to the system of pleading under the Judicature Acts and Rules, and the discretion of the judge as to costs, it would have the same practical effect (*m*). A reduction of the debt to the amount of the tender by a set-off accruing afterwards does not make the tender effectual (*n*).

A tender may be made in coin or, in the case of a sum above five pounds, by Bank of England notes, except in the case of a tender by the Bank of England or any of its branches (*o*). There must be an actual production of the money at the time of the tender, unless this is dispensed with by the creditor either expressly or by implication (*p*). If the debtor tells his creditor that he has come for the purpose of paying a specified amount, and the creditor says that it is too late, or is insufficient in amount, or otherwise indicates that he will not accept the money, the actual production is thereby

(*i*) *Wade's Case* (1601), 5 Co. Rep. 114 a; *Black* v. *Smith* (1792), Peake, 121; *Betterbee* v. *Davis* (1811), 3 Camp. 70; *Robinson* v. *Cook* (1815), 6 Taunt. 336; *Cadman* v. *Lubbock* (1824), 5 Dow. & Ry. (K. B.) 289; *Dean* v. *James* (1833), 4 B. & Ad. 546; *Bevans* v. *Rees* (1839), 5 M. & W. 306.

(*k*) *Dixon* v. *Clark* (1848), 5 C. B. 365; *James* v. *Vane* (*Lord Harry*) (1860), 2 E. & E. 883. In such a case the debtor can appropriate the amount tendered to such items as he pleases, but if he fails to do so at the time of the tender, it will not operate as a tender of any of the items unless it is sufficient to discharge the whole debt (*Hardingham* v. *Allen* (1848), 5 C. B. 793).

(*l*) *Searles* v. *Sadgrave* (1855), 5 E. & B. 639; *Phillpotts* v. *Clifton* (1861), 10 W. R. 135.

(*m*) See title SET-OFF AND COUNTERCLAIM.

(*n*) *Cotton* v. *Godwin* (1840), 7 M. & W. 147.

(*o*) Bank of England Act, 1833 (3 & 4 Will. 4, c. 98), s. 6. The words of the statute are "a tender of a note or notes of the Bank of England . . . shall be a legal tender, to the amount expressed in such note or notes, and shall be taken to be valid as a tender to such amount for all sums above five pounds on all occasions on which any tender of money may be legally made." It seems that this has been generally understood as preventing a five-pound note being legal tender for a sum of five pounds, though a five-pound note and a penny would be good tender for £5 0*s*. 1*d*., and two five-pound notes would be good tender for £10, and it has long been accepted that only for sums above five pounds can notes be tendered; see, *e.g.*, *per* JESSEL, M.R., in *Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555, C. A., at p. 563. Gold coins are a legal tender for any amount; silver coins for an amount not exceeding forty shillings; and bronze coins for an amount not exceeding one shilling (Coinage Act, 1870 (33 & 34 Vict. c. 10), s. 4). Every contract which involves a liability to pay money must be made according to the currency which is made legal tender by that Act, unless the contract is made according to the currency of some British possession or some foreign State (*ibid.*, s. 6). See title CONSTITUTIONAL LAW, Vol. VI., pp. 461 *et seq.*

(*p*) *Thomas* v. *Evans* (1808), 10 East, 101; *Glasscott* v. *Day* (1803), 5 Esp. 48; *Huxham* v. *Smith* (1809), 2 Camp. 19; *Ryder* v. *Townsend* (*Lord C.*) (1825), 7 Dow. & Ry. (K. B.) 119. As to what is a sufficient production of the money, see *Alexander* v. *Brown* (1824), 1 C. & P. 288; *Leatherdale* v. *Sweepstone* (1828), 3 C. & P. 342.

SECT. 2. Excuses for Non-performance.

dispensed with, and there is a good tender of the amount mentioned by the debtor (*q*).

Tender by negotiable instrument.

A tender by bill or cheque, or notes of a bank other than the Bank of England, is not a legal tender; but if on such a tender being made the creditor refuses to accept it on the ground that a larger sum is due, or on any ground other than the form of the tender, to which he does not make any objection, he will be considered to waive the objection to the nature of the tender as regards form (*r*).

Time of tender.

861. Where a debt is expressly made payable on a particular day, a tender made after the date for payment is strictly not a legal tender (*a*), but, provided it is made before the commencement of an action for the recovery of the debt, it will, as a general rule, have the same effect as a legal tender (*b*). In the case of a contract for the sale of goods, an invalid tender does not prevent the seller from subsequently making a valid tender, provided it is made within the time limited for delivery of the goods (*c*).

Must be unconditional.

862. A tender must be unconditional. If it is made on such terms that the creditor would by taking the money be precluded from afterwards claiming that a larger amount was due, as, for instance, if the debtor requires a receipt in full discharge, or a receipt expressed to be for rent due to a particular day, the tender is bad (*d*); but a tender is not invalidated by the fact that it is made "under protest," or is accompanied by a statement that the amount is all that the debtor considers to be due, provided that the creditor is not required to make any admission as a condition of his taking the money (*e*). Whether a tender accompanied by any such statement is conditional or unconditional is a question of fact in

(*q*) *Re Farley, Ex parte Danks* (1852), 2 De G. M. & G. 936; *Finch* v. *Brook* (1834), 1 Bing. (N. C.) 253; *Black* v. *Smith* (1792), Peake, 121; *Harding* v. *Davies* (1825), 2 C. & P. 77; *Douglas* v. *Patrick* (1790), 3 Term Rep. 683; *The Owners of the "Norway"* v. *Ashburne; The "Norway"* (1865), 3 Moo. P. C. C. (N. S.) 245.

(*r*) *Polglass* v. *Oliver* (1831), 2 Cr. & J. 15; *Jones* v. *Arthur* (1840), 8 Dowl. 442; *Re Steam Stoker Co.* (1875), L. R. 19 Eq. 416; *Wright* v. *Reed* (1790), 3 Term Rep. 554; *Lockyer* v. *Jones* (1796), Peake, 239, n.; *Tiley* v. *Courtier* (1817), 2 Cr. & J. 16, n.; *Johnston* v. *Boyes*, [1899] 2 Ch. 73.

(*a*) *Hume* v. *Peploe* (1807), 8 East, 168; *Poole* v. *Tumbridge* (1837), 2 M. & W. 223; *Dixon* v. *Clark* (1848), 5 C. B. 365; *Dobie* v. *Larkan* (1855), 10 Exch. 776.

(*b*) The fact that the creditor had instructed a solicitor to take proceedings does not affect the validity of a tender made before the proceedings were actually commenced (*Briggs* v. *Calverly* (1800), 8 Term Rep. 629; *Moffat* v. *Parsons* (1814), 5 Taunt. 307).

(*c*) *Borrowman* v. *Free* (1878), 4 Q. B. D. 500, C. A. See for further details as to the tender of goods under a contract of sale, title SALE OF GOODS.

(*d*) *Evans* v. *Judkins* (1815), 4 Camp. 156; *Laing* v. *Meader* (1824), 1 C. & P. 257; *Strong* v. *Harvey* (1825), 3 Bing. 304; *Hough* v. *May* (1836), 4 Ad. & El. 954; *Sutton* v. *Hawkins* (1838), 8 C. & P. 259; *Hastings* (*Marquis*) v. *Thorley* (1838), 8 C. & P. 573; *Henwood* v. *Oliver* (1841), 1 Q. B. 409; *Foord* v. *Noll* (1842), 2 Dowl. (N. S.) 617; *Bowen* v. *Owen* (1847), 11 Q. B. 130; *Glasscott* v. *Day* (1803), 5 Esp. 48; *Finch* v. *Miller* (1848), 5 C. B. 428.

(*e*) *Robinson* v. *Ferreday* (1839), 8 C. & P. 752; *Manning* v. *Lunn* (1845), 2 Car. & Kir. 13; *Scott* v. *Uxbridge and Rickmansworth Rail. Co.* (1866), L. R.

each particular case (*f*). A tender is not invalid merely because the debtor asks for a receipt, if he does not make it a condition of payment (*g*). Even if he makes it a condition, the creditor will be precluded from taking the objection if he refuses to accept the money on some other ground (*h*).

Tender by and to agent.

863. A tender need not be made to the creditor personally; it may be made to any person authorised or held out as being authorised by him to receive payment on his behalf (*i*). A person authorised to accept a tender has no implied authority to accept a cheque in payment, unless it can be shown that it is usual in the ordinary course of the particular business to take payment by cheque (*k*). In the case of a debt owing to two or more persons jointly a tender made to one of the joint creditors on behalf of all operates as a tender to them all (*l*). A tender may be made by an agent if he has been authorised by the debtor to make it, or if his act has been subsequently ratified by the debtor (*m*).

SUB-SECT. 2.—*Rescission by New Agreement.*

Rescission.

864. A contract may be discharged at any time before breach by a new agreement made between the parties (*n*). Such new agreement may either simply rescind the original contract or alter its terms and substitute a new contract in its place.

In order to operate as a discharge of the original contract the new agreement must possess all the attributes which are requisite

1 C. P. 596; *Bowen* v. *Owen* (1847), 11 Q. B. 130; *Henwood* v. *Oliver* (1841), 1 Q. B. 409; *Jones* v. *Bridgman* (1878), 39 L. T. 500; *Sweny* v. *Smith* (1869), L. R. 7 Eq. 324; *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 1, C. A.

(*f*) *Marsden* v. *Goode* (1845), 2 Car. & Kir. 133; *Eckstein* v. *Reynolds* (1837), 7 Ad. & El. 80.

(*g*) *Jones* v. *Arthur* (1840), 8 Dowl. 442. Whether requiring a receipt as a condition of payment invalidates a tender is open to question. In *Laing* v. *Meader* (1834), 1 C. & P. 257, it was held that it did, and this is probably good law in the case of sums under £2. But a refusal to give a stamped receipt on payment of £2 or upwards renders the creditor liable to a penalty (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 103), and therefore the debtor would, in such a case, by insisting on a receipt, merely be requiring the creditor to fulfil a legal obligation, which could hardly be held to make the tender conditional (see *Richardson* v. *Jackson* (1841), 8 M. & W. 298). See as to stamp on receipt, p. 452, *post*.

(*h*) *Richardson* v. *Jackson*, *supra*.

(*i*) *Goodland* v. *Blewith* (1808), 1 Camp. 477; *Moffat* v. *Parsons* (1814), 5 Taunt. 307; *Kirton* v. *Braithwaite* (1836), 1 M. & W. 310; *Watson* v. *Hetherington* (1843), 1 Car. & Kir. 36; *Finch* v. *Boning* (1879), 4 C. P. D. 143. A bailiff authorised to distrain for rent has implied authority to receive a tender of rent and expenses (*Hatch* v. *Hale* (1850), 15 Q. B. 10), but not a man who is merely left in possession by the bailiff (*Boulton* v. *Reynolds* (1859), 29 L. J. (Q. B.) 11).

(*k*) *Blumberg* v. *Life Interests and Reversionary Securities Corporation*, [1897] 1 Ch. 171; affirmed on facts, [1898] 1 Ch. 27, C. A. See p. 447, *post*.

(*l*) *Douglas* v. *Patrick* (1790), 3 Term Rep. 683.

(*m*) *Read* v. *Goldring* (1813), 2 M. & S. 86; *Harding* v. *Davies* (1825), 2 C. & P. 77. In the former case it was held that a tender by an agent of the whole sum demanded by the creditor was good, although the debtor had only authorised him to tender a smaller sum, and he had offered the rest at his own risk. As to the authority of an agent in general and the ratification of acts done by an agent without authority, see title AGENCY, Vol. I., p. 145.

(*n*) *King* v. *Gillett* (1840), 7 M. & W. 55; *Hobson* v. *Cowley* (1858), 27 L. J.

SECT. 2. Excuses for Non-performance.

to constitute a valid contract (*a*). A promise made without consideration, or not in the form required by law, cannot have this effect, although if the substituted agreement is in fact carried out in such a case it may operate as a waiver of the obligations imposed by the original contract (*b*).

Parol variation.

If the original contract is one which is required by law to be made in writing, it cannot be varied by a new verbal agreement, even if the variation relates only to a part of the contract which, if it stood by itself, would not be required to be in writing (*c*). But in such a case the contract can be rescinded altogether by a verbal agreement (*d*). If the original contract, though made in writing, is one which is not required by law to be made in that form, it can be varied by a verbal agreement (*e*).

Deeds.

At common law a contract under seal could not be discharged or varied by a fresh agreement which was not made under seal (*f*); but this technical rule was not recognised in equity, and the rule of equity now prevails (*g*).

Repudiation.

865. A contract cannot be rescinded in the strict legal sense of the term without the consent of both parties, and a mere intimation by one party of his intention not to perform his promise does not discharge the contract unless the other party elects to treat it as a breach of the contract (*h*); but where one party by acts and conduct evinces an intention no longer to be

(EX.) 205. In order to discharge the original contract it is not necessary that the new agreement should have been performed, as is required as a general rule in the case of an accord and satisfaction discharging the right of action which accrues on a breach of contract (*Taylor* v. *Hilary* (1835), 1 Cr. M. & R. 741; *Foster* v. *Dawber* (1851), 6 Exch. 839). See p. 441, *post*.

(*a*) *Firth* v. *Midland Rail. Co.* (1875), 44 L. J. (CH.) 313. As to the requisites of a valid contract, see pp. 345 *et seq.*, *ante*.

(*b*) See p. 423, *post*.

(*c*) *Goss* v. *Nugent* (*Lord*) (1833), 5 B. & Ad. 58; *Harvey* v. *Grabham* (1836), 5 Ad. & El. 61; *Stowell* v. *Robinson* (1837), 3 Bing. (N. C.) 928; *Stead* v. *Dawber* (1839), 10 Ad. & El. 57; *Marshall* v. *Lynn* (1840), 6 M. & W. 109; *Giraud* v. *Richmond* (1846), 2 C. B. 835; *Noble* v. *Ward* (1867), L. R. 2 Exch. 135, Ex. Ch.; *Plevins* v. *Downing* (1876), 1 C. P. D. 220; *Sanderson* v. *Graves* (1875), L. R. 10 Exch. 234. Nor could such an agreement be enforced in equity (*Rich* v. *Jackson* (1794), 4 Bro. C. C. 514; *Emmet* v. *Dewhurst* (1851), 3 Mac. & G. 587). As to the effect in equity of part performance of the new agreement, see p. 381, *ante*.

(*d*) *Goman* v. *Salisbury* (1684), 1 Vern. 240; *Price* v. *Dyer* (1810), 17 Ves. 356; *Robinson* v. *Page* (1826), 3 Russ. 114; *Goss* v. *Nugent*, *supra*; *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634.

(*e*) *Goss* v. *Nugent*, *supra*.

(*f*) *Kaye* v. *Waghorn* (1809), 1 Taunt. 428; *Doe* d. *Muston* v. *Gladwin* (1845), 6 Q. B. 953; *Cordwent* v. *Hunt* (1818), 8 Taunt. 596; Selwyn's Nisi Prius, 13th ed., p. 468. But a parol agreement not to enforce performance of the covenants in a deed was valid at common law (*Nash* v. *Armstrong* (1861), 10 C. B. (N. S.) 259).

(*g*) *Webb* v. *Hewitt* (1857), 3 K. & J. 438; *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537; Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (11).

(*h*) *Leigh* v. *Paterson* (1818), 2 Moore (C. P.), 588; *Phillpotts* v. *Evans* (1839), 5 M. & W. 475; *Heinekey* v. *Earle* (1857), 8 E. & B. 410, Ex. Ch.; *Michael* v. *Hart*, [1902] 1 K. B. 482, C. A., affirmed in H. L. on the facts. As to the right of the other party to treat such an intimation as a breach of the contract, see p. 438, *post*; and as to what acts amount to repudiation, see *General Billposting Co.* v. *Atkinson*, [1909] A. C. 118, and other cases cited in next note.

bound by the contract, the other party will be justified in regarding himself as emancipated from continued liability under the contract (*i*).

Implied rescission.

866. A rescission of the original contract, either wholly or in part, may be implied where the parties have subsequently entered into an agreement which is inconsistent with it (*k*); and where neither party has insisted upon the performance of the contract for a long period after it was made, it may be inferred that they intended to abandon it altogether. In that case the contract will be deemed to be rescinded although no express agreement to this effect has been made (*l*).

Partly performed contract.

Where a contract that has been partly performed is rescinded, the question whether any claim can be made in respect of what has been done under the contract depends upon the intention of the parties, to be gathered from the terms of the new agreement (*m*).

Novation.

867. One of the modes in which a contract may be discharged by a new agreement is called novation. This occurs where a third person undertakes the obligations of the contract and his liability is accepted by the promisee in place of that of the original promisor (*n*).

SUB-SECT. 3.—*Waiver.*

Waiver.

868. A contract may be discharged, either wholly or in part, before there has been any breach of it, by a waiver of the right to insist upon its performance (*o*). Where, for instance, one party consents at the request of the other to extend the time for performance or to accept performance in a different mode from that contracted for, although there is no binding agreement which prevents him from enforcing his rights under the contract, unless a fresh agreement is made under seal or he receives some consideration for his forbearance, still, if the new arrangement is in fact carried out, the obligation of the other party under the contract is discharged to the extent to which the promisee has waived his rights (*p*).

(*i*) *General Billposting Co.* v. *Atkinson*, [1909] A. C. 118, see *per* Lord COLLINS, at p. 122; *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339, *per* BOWEN, L.J., at p. 365; and see also *Freeth* v. *Burr* (1874), L. R. 9 C. P. at p. 213; *Mersey Steel Co.* v. *Naylor* (1884), 9 App. Cas. 434.

(*k*) *Hunt* v. *South Eastern Rail. Co.* (1875), 45 L. J. (Q. B.) 87, H. L.; *Dodd* v. *Churton*, [1897] 1 Q. B. 562, C. A.; *Patmore* v. *Colburn* (1834), 1 Cr. M. & R. 65; *Thornhill* v. *Neats* (1860), 8 C. B. (N. S.) 831. As to the rescission of an agreement for separation between husband and wife by a reconciliation and return to cohabitation, see title HUSBAND AND WIFE.

(*l*) *Davis* v. *Bomford* (1860), 6 H. & N. 245; *Morgan* v. *Bain* (1874), L. R. 10 C. P. 15; *Bond* v. *Walford* (1886), 32 Ch. D. 238.

(*m*) *Lamburn* v. *Cruden* (1841), 2 Man. & G. 253; *Patmore* v. *Colburn*, *supra*. As to the return of premium where a partnership has been prematurely dissolved, see s. 40 of the Partnership Act, 1890 (53 & 54 Vict. c. 39); and see title PARTNERSHIP. As to the effect of a new agreement in discharging a surety who guaranteed the performance of the original contract, see title GUARANTEE.

(*n*) *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, *per* Lord SELBORNE, L.C., at p. 351; *Commercial Bank of Tasmania* v. *Jones*, [1893] A. C. 313, C. A. This subject is dealt with in detail at pp. 505 *et seq.*, *post*.

(*o*) *Kelsey* v. *Dodd* (1881), 52 L. J. (CH.) 34. Where there has been a breach of the contract, the right of action which thereupon accrues can be discharged by release. See p. 454, *post*.

(*p*) *Foster* v. *Dawber* (1851), 6 Exch. 839; *Dobson* v. *Espie* (1857), 2 H. & N.

SECT. 2. Excuses for Non-performance.

Bills of Exchange.

An exception to the rule that a waiver is not binding without consideration exists in the case of bills of exchange and promissory notes, which may be discharged by the holder absolutely and unconditionally renouncing his rights against the acceptor or maker at or after the maturity of the bill or note. Such renunciation must be in writing unless the bill or note is delivered up, but no consideration is required for it (*q*).

Verbal waiver of written contract.

In the case of a contract which is required by law to be in writing, although its terms cannot be varied by a fresh agreement that is not made in writing, there is nothing to prevent the parties from agreeing verbally to waive the stipulations of the contract as to the mode or time of performance; and, if the contract is performed in accordance with such verbal agreement, the obligations which have been waived are discharged (*r*).

SUB-SECT. 4.—*Alteration or Cancellation of Written Contract.*

Alteration of written contract.

869. Any material alteration of a written contract which is intentionally made by the promisee without the consent of the promisor, whether by adding anything to the contract or by striking out any part of it or otherwise, avoids the contract as against the person who would otherwise be liable upon it, even if the original words can still be read (*s*). The rule applies not only to contracts under seal, but to all contracts in writing and written instruments (*t*).

By stranger.

Where the contract is in the custody of the promisee or of his agent, the other party is discharged, even if the alteration is made by a stranger without the knowledge of the promisee (*a*). The promisor is not discharged where the alteration was made by accident or mistake or by a stranger when the contract was not in the custody of the promisee (*b*); but the contract is avoided where

79; *McManus* v. *Bark* (1870), L. R. 5 Exch. 65; *Williams* v. *Stern* (1879), 5 Q. B. D. 409, C. A. As to the discharge of a contract by a new agreement, see p. 421, *ante*.

(*q*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 62, 89. See title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 551.

(*r*) *Stead* v. *Dawber* (1839), 10 Ad. & El. 57; *Moore* v. *Campbell* (1854), 10 Exch. 323; *Ogle* v. *Vane* (*Earl*) (1868), L. R. 3 Q. B. 272, Ex. Ch.; *Tyers* v. *Rosedale and Ferryhill Iron Co.* (1875), L. R. 10 Exch. 195, Ex. Ch.; *Hickman* v. *Haynes* (1875), L. R. 10 C. P. 598; *Leather-Cloth Co.* v. *Hieronimus* (1875), L. R. 10 Q. B. 140; *Plevins* v. *Downing* (1876), 1 C. P. D. 220.

(*s*) *Pigot's Case* (1614), 11 Co. Rep. 26 b; *Fairlie* v. *Christie* (1817), 7 Taunt. 416; *Laird* v. *Robertson* (1791), 4 Bro. Parl. Cas. 488. As to what amounts to a material alteration, see *Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555; *Suker* v. *Neale* (1847), 1 Exch. 468; *Re Howgate and Osborn*, [1902] 1 Ch. 451.

(*t*) *Master* v. *Miller* (1791), 4 Term Rep. 320, affirmed (1793) 2 Hy. Bl. 141, Ex. Ch., 1 Smith, L. C., 11th ed., p. 767; *Powell* v. *Divett* (1812), 15 East, 29; *Croockewit* v. *Fletcher* (1857), 1 H. & N. 893 (charterparty); *Pattinson* v. *Luckley* (1875), L. R. 10 Exch. 338 (building contract); *Sellin* v. *Price* (1867), L. R. 2 Exch. 189; *Langhorn* v. *Cologan* (1812), 4 Taunt. 330. As to alteration of negotiable instruments, see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 514, 552, 575.

(*a*) *Davidson* v. *Cooper* (1844), 13 M. & W. 343, Ex. Ch.; *Bank of Hindostan, China and Japan* v. *Smith* (1867), 36 L. J. (C. P.) 241; but see *per* Lord HERSCHELL in *Lowe* v. *Fox* (1887), 12 App. Cas. 206, at p. 217.

(*b*) *Argoll* (*Lady*) v. *Cheney* (1625), Palm. 402; *Henfree* v. *Bromley* (1805), 6 East, 309; *Raper* v. *Birkbeck* (1812), 15 East, 17; *Wilkinson* v. *Johnson* (1824), 3 B. & C. 428; *Novelli* v. *Rossi* (1831), 2 B. & Ad. 757.

the alteration was intentional, even if it was made under a mistake of law as to the legal effect of the document (*c*). If the alteration is made by the promisor or by someone for whose acts he is responsible, the contract is not avoided, but the other party is entitled to enforce it according to its original tenor (*d*).

Cancellation.

870. The cancellation of a bond, or of a bill of exchange or promissory note, by or with the consent of the obligee or promisee, and with the intention of cancelling the obligation, discharges it (*e*). But a cancellation without the consent of the obligee or promisee, or by mistake or accident, without any intention to discharge the obligation, does not affect the liability of the parties (*f*).

Executory contract.

871. In the case of an executory contract the obligation is discharged altogether by alteration or cancellation, even if the alteration relates only to one out of several distinct covenants (*g*); but where the contract has been executed or partly executed the alteration or cancellation of it will not divest any property or right which has once vested under it (*h*).

Joint promises.

872. Where several persons are bound severally and not jointly by the same deed, the removal of the seal of one of the obligors does not discharge the others (*i*); and where an alteration is agreed to by some of the parties who are bound by the contract and not by others, the latter only are discharged (*j*). But the removal of the seal of one of two or more persons bound jointly or jointly and severally, *animo cancellandi*, discharges them all (*k*). A deed between several parties may be altered by consent of parties who have not executed it, after execution by some of the parties, if the alteration in no way affects the rights or liabilities of the parties who have already executed the instrument (*l*).

(*c*) *Bank of Hindostan, China and Japan* v. *Smith* (1867), 36 L. J. (C. P.) 241.

(*d*) *Pattinson* v. *Luckley* (1875), L. R. 10 Exch. 330.

(*e*) 3 Preston, Abstracts of Titles, 103; *Seaton* v. *Henson* (1678), 2 Lev. 220; *Alsager* v. *Close* (1842), 10 M. & W. 576; *Bolton* v. *Carlisle* (*Bishop*) (1793), 2 Hy. Bl. 260; *Harrison* v. *Owen* (1738), 1 Atk. 520; *Gilbert* v. *Wetherell* (1825), 2 Sim. & St. 254; *Warwick* v. *Rogers* (1845), 5 Man. & G. 352; *Prince* v. *Oriental Bank* (1878), 3 App. Cas. 325.

(*f*) *Re Smith, Ex parte Smith* (1843), 3 Mont. D. & De G. 378; *Raper* v. *Birkbeck* (1812), 15 East, 17; *Wilkinson* v. *Johnson* (1824), 3 B. & C. 428; *Bolton* v. *Carlisle* (*Bishop*), *supra*; *Re Dixon, Heynes* v. *Dixon*, [1900] 2 Ch. 561, C. A.; *Novelli* v. *Rossi* (1831), 2 B. & Ad. 757; *Perrott* v. *Perrott* (1812), 14 East, 428.

(*g*) *Pigot's Case* (1614), 11 Co. Rep. 26 b; *Mollett* v. *Wackerbarth* (1847), 5 C. B. 181, *per* MAULE, J., at p. 193.

(*h*) *Bolton* v. *Carlisle* (*Bishop*), *supra*; *Roe* d. *Berkeley* (*Earl*) v. *York* (*Archbishop*) (1805), 6 East, 86; *Langhorn* v. *Cologan* (1812), 4 Taunt. 330; *Doe* d. *Lewis* v. *Bingham* (1821), 4 B. & Ald. 672; *Hutchins* v. *Scott* (1837), 2 M. & W. 809; *West* v. *Steward* (1845), 14 M. & W. 47; *Agricultural Cattle Insurance Co.* v. *Fitzgerald* (1851), 16 Q. B. 432; *Ward* (*Lord*) v. *Lumley* (1860), 5 H. & N. 87, 656; *Green* v. *Attenborough* (1864), 3 H. & C. 468, Ex. Ch.; *Pattinson* v. *Luckley*, *supra*.

(*i*) *Collins* v. *Prosser* (1823), 1 B. & C. 682.

(*j*) *Laird* v. *Robertson* (1791), 4 Bro. Parl. Cas. 488; *Langhorn* v. *Cologan*, *supra*; *Campbell* v. *Christie* (1817), 2 Stark. 64; *Fairlie* v. *Christie* (1817), 7 Taunt. 416.

(*k*) *Seaton* v. *Henson*, *supra*; *Bayly* v. *Garford* (1641), March, 125; *Collins* v. *Prosser*, *supra*.

(*l*) *Doe* d. *Lewis* v. *Bingham*, *supra*.

SECT. 2. Excuses for Non-performance.

Immaterial alteration.

873. In order to have the effect of discharging the contract the alteration must be material, that is to say, it must be one which alters the legal effect of the instrument (*m*). An alteration which merely expresses what would otherwise have been implied is immaterial and does not affect the liability under the contract (*n*).

Alteration by consent.

874. Where an alteration which is inconsistent with the terms of the contract is made with the consent of both parties, this amounts to a new agreement which supersedes the original contract (*o*); but an alteration which consists merely in filling in details which were agreed upon before the contract was signed, or in correcting a mistake which was made in reducing the contract to writing, only expresses more correctly the original intention of the parties, and does not amount to a new agreement or affect the liability under the contract (*p*). Whether a particular alteration was made before or after the execution of the instrument is a matter of evidence. In the case of a deed, at any rate, the presumption is that it was made before execution, because it could not have been properly made afterwards (*q*).

Loss of document.

875. The loss or accidental destruction of a written contract does not discharge the parties liable under it, but only affects the mode of proving its contents (*r*).

SUB-SECT. 5.—*Impossibility of Performance.*

Impossibility.

876. Impossibility of performance does not as a rule discharge the liability under a contract, but in certain cases the promisor is

(*m*) *Mollett* v. *Wackerbarth* (1847), 5 C. B. 181 (addition to sold note of the words "of their own manufacture" held a material alteration); *Aldous* v. *Cornwell* (1868), L. R. 3 Q. B. 573 (addition to promissory note of words "on demand" held immaterial); *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75; *Re Howgate and Osborne's Contract*, [1902] 1 Ch. 451 (immaterial alteration of name in mortgage); *Crediton* (*Bishop*) v. *Exeter* (*Bishop*), [1905] 2 Ch. 455 (immaterial alteration of date of deed). An alteration in the number of a Bank of England note is, however, considered material, although it does not vary the contract, because such a note is part of the currency, and the number is a material part of the instrument (*Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555, C. A.; *Leeds Bank* v. *Walker* (1883), 11 Q. B. D. 84). See, further, title DEEDS AND OTHER INSTRUMENTS.

(*n*) *Waugh* v. *Bussell* (1814), 5 Taunt. 707; *Sanderson* v. *Symonds* (1819), 1 Brod. & Bing. 426; *Trew* v. *Burton* (1833), 1 Cr. & M. 533; *Wood* v. *Slack* (1868), L. R. 3 Q. B. 379; see *Cariss* v. *Tattersall* (1841), 2 Man. & G. 890.

(*o*) As to the discharge of a contract by a new agreement, see p. 421, *ante*.

(*p*) *Bluck* v. *Gompertz* (1852), 7 Exch. 862; *Adsetts* v. *Hives* (1863), 33 Beav. 52; *Hudson* v. *Revett* (1829), 2 Moo. & P. 663, 692; *Wood* v. *Slack* (1868), L. R. 3 Q. B. 379; *Eagleton* v. *Gutteridge* (1843), 11 M. & W. 465; *Falmouth* (*Earl*) v. *Roberts* (1842), 9 M. & W. 469; *Re Howgate and Osborn's Contract*, [1902] 1 Ch. 451; and see *Gardner* v. *Walsh* (1855), 5 E. & B. 83, and *Calton* v. *Simpson* (1839), 8 Ad. & El. 136.

(*q*) *Doe* d. *Tatum* v. *Catomore* (1851), 16 Q. B. 745; *Simmons* v. *Rudall* (1851), 1 Sim (N. S.) 115, at p. 136. As to the alteration of a bill of exchange, see s. 64 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61); *Bank of Montreal* v. *Exhibit and Trading Co.* (1906), 11 Com. Cas. 250; and title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 552 *et seq.*; and as to the discharge of a surety by an alteration of the agreement between the creditor and the principal debtor, see title GUARANTEE.

(*r*) See title EVIDENCE. As to the rights of the holder of a bill of exchange which has been lost, see ss. 69 and 70 of the Bills of Exchange Act, 1882 (45

excused from performing his promise if it is shown that performance is impossible without any default on his part.

A promise which is manifestly incapable of performance either in fact or in law at the time when it is made cannot form a binding contract, because there is no real consideration (*s*); and where the subject-matter of the contract has without the knowledge of either party ceased to exist before the contract was made, the contract is void on the ground of mistake (*t*).

Relative impossibility.

877. Impossibility, as an excuse for non-performance, must as a general rule be a physical or legal impossibility, and not merely an impossibility with reference to the ability and circumstances of the promisor (*a*).

Absolute promise.

A party who has made an absolute promise is not discharged from liability if it afterwards appears that it is impossible for him to perform the contract, even though this is not due to any default on his part (*b*). It is his own fault if he runs the risk of undertaking to perform an impossibility (*c*). Where the impossibility of performance was known to the promisor at the time when the contract was made, but not to the promisee, the former will be taken to have made an absolute promise (*d*). Even if the impossibility is caused by what is called the act of God, the promisor is not in such a case excused from performing his promise (*e*). The ordinary rule is that, where the law creates a duty, and the person

& 46 Vict. c. 61), and title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 514.

(*s*) See p. 385, *ante*; *The Salvador* (1905), 25 T. L. R. 384.

(*t*) See titles MISTAKE; SALE OF GOODS.

(*a*) *Thornborow* v. *Whitacre* (1706), 2 Ld. Raym. 1164 (the geometrical progression case). The real ground of the decision in this case seems to have been that the promise was an absolute one, and it is perhaps of little practical importance nowadays. But the distinction between a natural or legal and a merely relative impossibility should not be lost sight of.

(*b*) *Paradine* v. *Jane* (1647), Aleyn, 26; *Bullock* v. *Dommitt* (1796), 6 Term Rep. 650 (general covenant by lessee to repair obliges him to rebuild in case of destruction by accidental fire); *Bute* (*Marquis*) v. *Thompson* (1844), 13 M. & W. 487; *Hills* v. *Sughrue* (1846), 15 M. & W. 253 (performance of contract to proceed to a particular place and there load a full cargo of guano not excused by the circumstance that no guano could be found there on arrival); *Jones* v. *St. John's College* (1870), L. R. 6 Q. B. 115 (undertaking in building contract to complete the work by a specified time, the contract providing for additions and alterations, held absolute to complete within the time fixed, and not subject to any implied condition that the additions and alterations should be such as might reasonably be completed within the time); *Re Arthur*, *Arthur* v. *Wynne* (1880), 14 Ch. D. 603 (where a man covenanted to insure his life, it was held to be no excuse for a breach of the covenant that the life had become uninsurable owing to ill-health); *M'Donald* v. *Workington Corporation* (1893), 9 T. L. R. 230, C. A.; *Ashmore & Son* v. *C. S. Cox & Co.*, [1899] 1 Q. B. 436; *Baily* v. *De Crespigny* (1869), L. R. 4 Q. B. 180, at p. 185. Reference may also be made to *Brecknock Canal Co.* v. *Pritchard* (1796), 6 Term Rep. 750 (covenant to repair bridge); and see the observations of WILLES, J., in *Lloyd* v. *Guibert* (1865), L. R. 1 Q. B. 115, Ex. Ch.

(*c*) *Hale* v. *Rawson* (1858), 4 C. B. (N. S.) 85. As to the defence of impossibility in actions for specific performance, see title SPECIFIC PERFORMANCE.

(*d*) *Wild* v. *Harris* (1849), 7 C. B. 999; *Millward* v. *Littlewood* (1850), 5 Exch. 775; *Ashcroft* v. *Crow Orchard Colliery Co.* (1874), L. R. 9 Q. B. 540.

(*e*) *Hall* v. *Wright* (1859), E. B. & E. 765, Ex. Ch., *per* MARTIN, B., at p. 789; *Nichols* v. *Marsland* (1876), 2 Ex. D. 1, C. A., at p. 4.

SECT. 2. Excuses for Non-performance.

on whom it is imposed is disabled from performing it, without any default of his own, by the act of God or the King's enemies, the law will excuse him; but when a person by his own contract unconditionally undertakes a duty he is bound to perform it or take the consequences, notwithstanding any accident by inevitable necessity (*f*).

Act of God.

878. An act of God (*g*), in the legal sense of the term, may be defined as an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against (*h*); or, more accurately, as an accident due to natural causes, directly and exclusively without human intervention, and which could not have been avoided by any amount of foresight and pains and care reasonably to be expected of the person sought to be made liable for it, or who seeks to excuse himself on the ground of it (*i*). The occurrence need not be unique, nor need it be one that happens for the first time; it is enough that it is extraordinary, and such as could not reasonably be anticipated (*k*). The mere fact that a phenomenon has happened once, when it does not carry with it or import any probability of a recurrence—when, in other words, it does not imply any law from which its recurrence can be inferred—does not prevent that phenomenon from being an act of God (*k*). It must, however, be something overwhelming and not merely an ordinary accidental circumstance (*l*), and it must not arise from the act of man (*m*).

Nature and characteristics.

The following amongst other occurrences have been held to be acts of God: A violent storm at sea (*n*), an extraordinarily high

(*f*) *Nichols* v. *Marsland* (1876), 2 Ex. D. 1, C. A.; *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743.

(*g*) The expression *vis major* has a larger signification, and includes the "King's enemies" as well as the act of God; see *per* TINDAL, C.J., in *Simmons* v. *Norton* (1831), 7 Bing. 640, at p. 648. The act of God is distinct from "inevitable accident"; see *per* Lord MANSFIELD, C.J., *Trent and Mersey Navigation* v. *Wood* (1785), 4 Doug. (K. B.) 287, at p. 290; *Forward* v. *Pittard* (1785), 1 Term Rep. 27, at p. 33.

For the law as to the defence of inevitable accident in case of collision at sea, see title SHIPPING AND NAVIGATION.

(*h*) *Pandorf* v. *Hamilton* (1886), 17 Q. B. D. 670, C. A., at p. 675, where Lord ESHER, M.R., said that the term did "not mean the act of God in the ecclesiastical and biblical sense, according to which almost everything is said to be the act of God" (see note (*m*), *infra*.

(*i*) *Nugent* v. *Smith* (1876), 1 C. P. D. 423, C. A., at p. 434, reversing S. C. (1876), 1 C. P. D. 19.

(*k*) *Nitro-Phosphate and Odams Chemical Manure Co.* v. *London and St. Katharine Docks Co.* (1878), 9 Ch. D. 503, C. A., *per* FRY, J., at pp. 515, 516. See also *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q. B. D. 418, at pp. 421, 422.

(*l*) *Oakley* v. *Portsmouth and Ryde Steam Packet Co.* (1856), 11 Exch. 618, at p. 623.

(*m*) The act of God is "something in opposition to the act of man," *per* Lord MANSFIELD, C.J., in *Forward* v. *Pittard* (1785), 1 Term Rep. 27, at p. 33. "The act of God is a natural necessity, and inevitably such, as winds, storms etc.," *per* Lord MANSFIELD, C.J., in *Trent and Mersey Navigation* v. *Wood* (1785), as reported 3 Esp. at p. 131.

(*n*) *Nugent* v. *Smith*, *supra*; *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743.

tide (*o*), an unprecedented rainfall (*p*), an extraordinary flood (*q*), an earthquake (*r*), an extraordinary frost (*s*), an extraordinary snowfall (*t*), fire caused by lightning (*u*), death (*w*), lunacy (*a*), and illness (*b*).

On the other hand, it has been held that the gnawing by rats of a hole in a pipe of a ship, through which the sea water came in and damaged the cargo (*c*), a fog (*d*), an ordinary fall of snow (*e*), and fire not caused by lightning (*f*) were not acts of God.

Alternative promises.

879. If a promise is made in an alternative form and one alternative is impossible to perform, the promisor must as a general rule perform the other (*g*); but where the performance of the other alternative, both alternatives being possible at the time of the contract, has become impossible by act of God, the question whether the promisor is bound to perform the other or is altogether excused depends on the intention of the parties, to be ascertained from the nature and terms of the contract and the circumstances of the particular case (*h*).

Conditional promise.

880. If a promise is by the terms of the contract made conditional upon the possibility of performance, the liability of the promisor is discharged where performance of the contract turns out to be impossible without any default on his part. Such a condition may be expressed in the contract, or may be implied from the

(*o*) *Nichols* v. *Marsland* (1876), 2 Ex. D. 1, C. A., affirming S. C. (1875) L. R. 10 Ex. Ch. 255.

(*p*) *Ibid.*; *Thomas* v. *Birmingham Canal Co.* (1879), 49 L. J. (Q. B.) 851; 43 L. T. 435. It must be such a rainfall as could not reasonably have been anticipated, and not merely an unusual rainfall such as the defendant ought to have been prepared for (*Dixon* v. *Metropolitan Board of Works* (1881), 7 Q. B. D. 418).

(*q*) *Ibid.* An extraordinary flood or tide means such a flood as no reasonable person would anticipate, *per* BRETT, M.R., in *R.* v. *Essex Commissioners of Sewers* (1885), 14 Q. B. D. 561, C. A., at p. 581, affirmed in H. L., *sub nom. Fobbing Commissioners of Sewers* v. *R.* (1886), 11 App. Cas. 449.

(*r*) *Ibid.*, at p. 5.

(*s*) *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781.

(*t*) *Briddon* v. *Great Northern Rail. Co.* (1858), 28 L. J. (EX.) 51.

(*u*) *Keighley's Case* (1609), 10 Co. Rep. 139 a, 140.

(*w*) *R.* v. *Leicestershire Justices* (1850), 15 Q. B. 88; *Pell* v. *Linnell* (1868), L. R. 3 C. P. 441, 443.

(*a*) *Re Bird*, *Bird* v. *Cross* (1894), 8 R. 326.

(*b*) *Cuckson* v. *Stones* (1858), 1 E. & E. 248, at p. 256; *K*—— v. *Raschen* (1878), 38 L. T. 38, *per* CLEASBY, B., at p. 40.

(*c*) *Pandorf* v. *Hamilton* (1886), 17 Q. B. D. 670, C. A. See especially at pp. 675, 684. On appeal the H. L. reversed the C. A. on the ground that the injury arose from the "dangers and accidents of the sea," but the point as to the act of God was not even raised on the appeal. See *Dale* v. *Hall* (1750), 1 Wils. 281. Compare *Carstairs* v. *Taylor* (1871), L. R. 6 Exch. 217.

(*d*) *Liver Alkali Co.* v. *Johnson* (1874), L. R. 9 Exch. 338.

(*e*) *Fenwick* v. *Schmalz* (1868), L. R. 3 C. P. 313, 316.

(*f*) *Forward* v. *Pittard* (1785), 1 Term Rep. 27, 33. See also, as to act of God generally, titles CARRIERS, Vol. IV., p. 8; NEGLIGENCE; SHIPPING AND NAVIGATION.

(*g*) *Da Costa* v. *Davis* (1798), 1 Bos. & P. 242; *Bute* (*Marquis*) v. *Thompson* (1844), 13 M. & W. 487; *Barkworth* v. *Young* (1856), 4 Drew. 1.

(*h*) *Barkworth* v. *Young*, *supra*, at pp. 24, 25, and cases there cited; *Anderson* v. *Commercial Union Assurance Co.* (1885), 55 L. J. (Q. B.) 146, C. A., *per* BOWEN, L.J.

SECT. 2. Excuses for Non-performance.

Implied condition.

nature or the subject-matter of the contract and the surrounding circumstances (*i*).

Where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some specified thing, without which the contract cannot be fulfilled, will continue to exist, or that a future event which forms the foundation of the contract will take place, the contract, though in terms absolute, is to be construed as being subject to an implied condition, that if before breach performance becomes impossible without default of either party and owing to circumstances which were not contemplated when the contract was made, the parties are to be excused from further performance (*j*). In such a case the contract is not avoided *ab initio* in the absence of any express provision to that effect (*k*), but each party will be left in the position in which he is found at the time when performance of the contract is ascertained to be impossible, and no legal right which

(*i*) The question whether a particular promise is absolute or not is one of construction in each case (*Elliott* v. *Crutchley*, [1906] A. C. 7; *Re Arthur, Arthur* v. *Wynne* (1880), 14 Ch. D. 603 (contract to insure held not excused by subsequent illness rendering insurance impossible); *Clifford* (*Lord*) v. *Watts* (1870), L. R. 5 C. P. 577 (covenant in a mining lease to dig not less than 1,000 tons of clay in each year held conditional on there being sufficient clay to make the performance possible), explaining *Bute* (*Marquis*) v. *Thompson* (1844), 13 M. & W. 487; *Hale* v. *Rawson* (1858), 4 C. B. (N. S.) 85 (agreement for the sale of goods to be delivered on the arrival of a certain vessel held an absolute contract to deliver in the event of the ship arriving, and not conditional on the goods arriving with the vessel); *Jones* v. *St. John's College* (1870), L. R. 6 Q. B. 115; *Thorn* v. *London Corporation* (1876), 1 App. Cas. 120. Compare *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544, C. A., and *Emmens* v. *Elderton* (1853), 4 H. L. Cas. 624, with *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256; *Northey* v. *Trevillion* (1902), 7 Com. Cas. 201; and *Bovine, Ltd.* v. *Dent and Wilkinson* (1904), 21 T. L. R. 82; and see the cases cited in the following note). As to the construction of charterparties and bills of lading, and especially of clauses in such documents relating to excepted risks, see title SHIPPING AND NAVIGATION.

At common law the contract of a common carrier is construed as being subject to an implied condition exempting him from liability in respect of loss occasioned by the act of God or the King's enemies. See title CARRIERS, Vol. IV., p. 8.

(*j*) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826 (contract for the letting of a music-hall for the purpose of giving concerts on four specified days held subject to an implied condition that the hall continued to exist, and, it having been accidentally burnt down, that the parties were excused from performance); *Appleby* v. *Myers* (1867), L. R. 2 C. P. 651, Ex. Ch. (similar case); *Howell* v. *Coupland* (1876), 1 Q. B. D. 258, C. A. (sale of 200 tons of potatoes to be grown on the seller's land during a particular season held subject to an implied condition that the seller was to be excused if, without any default on his part, the crop failed and delivery became impossible); *Hayward Brothers, Ltd.* v. *Daniel & Son* (1904), 91 L. T. 319; *Nickoll and Knight* v. *Ashton, Eldridge & Co.* [1901] 2 K. B. 126, C. A. (contract for sale of cargo to be shipped by a specified vessel held subject to an implied condition that the vessel should at the time specified for shipment be in existence as a cargo-carrying vessel); *Krell* v. *Henry*, [1903] 2 K. B. 740, C. A.; *Lumsden* v. *Barton & Co.* (1902), 19 T. L. R. 53; *Herne Bay Steam Boat Co.* v. *Hutton*, [1903] 2 K. B. 683, C. A.; *Re Arthur, Arthur* v. *Wynne* (1880), 14 Ch. D. 603; *Baily* v. *De Crespigny* (1869), L. R. 4 Q. B. 180 (landowner who covenanted for himself and his assigns not to build on the land held discharged by the compulsory acquisition of the land by a railway company under statutory powers); but see *The Salvador* (1909), 25 T. L. R. 384 (contract to take ship across Atlantic; ship incapable of undertaking the voyage).

(*k*) For instances of such a provision, see *Victoria Seats Agency* v. *Paget* (1902), 19 T. L. R. 16; *Fenton* v. *Victoria Seats Agency* (1902), 19 T. L. R. 17; *Elliott* v. *Crutchley*, [1906] A. C. 7.

has already accrued under the contract will be disturbed. Thus payment can still be enforced of any money which was payable under the contract before that time, but not of any money which had not then become due, and money that has been already paid cannot be recovered back (*l*).

Personal contracts.

On the same principle, a contract for personal services which can only be performed by the promisor himself will be construed as being subject to an implied condition that if he dies or becomes physically incapable of performing the contract without any default on his part he is excused from performance (*m*). Where personal considerations are of the foundation of the contract, as in cases of principal and agent or master and servant, the death of either party puts an end to the relation, and the contract is discharged unless there is a stipulation express or implied to the contrary (*n*).

Impossibility caused by statute.

881. Where performance of a contract has been rendered impossible by an Act of Parliament passed after the contract was made, the promisor is excused from performing his promise, unless it appears that he intended to bind himself with reference to the future state of the law, for the presumption is that the parties intend to contract with reference to the law as existing at the time when the contract is made (*o*).

(*l*) *Civil Service Co-operative Society* v. *General Steam Navigation Co.*, [1903] 2 K. B. 756, C. A., approving *Blakeley* v. *Muller*, [1903] 2 K. B. 760, n.; *Chandler* v. *Webster*, [1904] 1 K. B. 493, C. A.; see also *Clark* v. *Lindsay* (1903), 19 T. L. R. 202. If without the knowledge of the parties the impossibility of performance existed at the time when the contract was made, the contract is void altogether, and money paid under it can be recovered (*Griffith* v *Brymer* (1903), 19 T. L. R. 434). Most of the cases cited in this and the two preceding notes were decided upon contracts relating to the coronation of King Edward VII., which was postponed on account of His Majesty's sudden illness. For earlier cases reference may be made to *Hirst* v. *Tolson* (1850), 2 Mac. & G. 134; *Stubbs* v. *Holywell Rail. Co.* (1867) L. R. 2 Exch. 311; *Whincup* v. *Hughes* (1871), L. R. 6 C. P. 78; *Learoyd* v. *Brook*, [1891] 1 Q. B. 431, at p. 435.

(*m*) *Boast* v. *Firth* (1868), L. R. 4 C. P. 1; *Robinson* v. *Davison* (1871), L. R. 6 Exch. 269. In such a case the other party is also discharged from liability under the contract (*Poussard* v. *Spiers* (1876), 1 Q. B. D. 410). In *Simeon* v. *Watson* (1877), 46 L. J. (C. P.) 679, it was held a good defence to an action by a schoolmaster for removing a pupil without giving notice or paying an equivalent in money, according to the contract, that the removal was a temporary one, due to the pupil's illness.

(*n*) *Farrow* v. *Wilson* (1869), L. R. 4 C. P. 744; *Davison* v. *Reeves* (1892), 8 T. L. R. 391; *Hotel and General Advertising Co.* v. *Wickenden and Stene* (1899), 15 T. L. R. 302, C. A.; *Harvey* v. *The Tivoli, Manchester, Ltd.* (1907), 23 T. L. R. 592 (death of one member of a troupe of music-hall artistes). The contract, however, is not rescinded, and the death of one of the parties does not affect a right of action which vested under the contract before his death (*Stubbs* v. *Holywell Rail. Co.* (1867), L. R. 2 Exch. 311). As to the effect of the death of one partner on a contract of service made with a firm, see *Phillips* v. *Alhambra Palace Co.* (1900), 83 L. T. 431; *Tasker* v. *Shepherd* (1861), 6 H. & N. 575, and title PARTNERSHIP; as to the right of a master to discharge a servant on the ground of illness, see title MASTER AND SERVANT; and as to contracts to marry, see HUSBAND AND WIFE.

(*o*) *Brewster* v. *Kitchell* (1698), 1 Salk. 198; *Davis* v. *Cary* (1850), 15 Q. B. 418; *Wynn* v. *Shropshire Union Railways and Canal Co.* (1850), 5 Exch. 420; *Brown* v. *London Corporation* (1863), 13 C. B. (N. S.) 828, Ex. Ch.; *Slipper* v. *Tottenham and Hampstead Junction Rail. Co.* (1867), L. R. 4 Eq. 112; *Baily* v. *De Crespigny* (1869), L. R. 4 Q. B. 180; *Mills* v. *East London Union* (1872),

SECT. 2. Excuses for Non-performance.

Act of State.

The same principle applies where the impossibility is created by an act of State, such as a declaration of war or an embargo imposed upon shipping by an Order in Council (*p*), but not where it arises from foreign law or the act of a foreign State, except where the obligations of the parties under the contract are mutually dependent and both parties are prevented from performing them (*q*).

Act of party.

882. Where the conduct of the promisee has rendered performance impossible (*r*), or has prevented the promisor from performing his promise without subjecting himself to an action by a third person (*s*), the promisor is released from his obligation to perform his promise. Impossibility arising from the promisor's own act or default is not in any case an excuse for non-performance of his contract (*t*).

SUB-SECT. 6.—*Failure of Condition.*

Conditional promises.

883. A promise may be either absolute or conditional. A conditional promise is one the liability to perform which depends upon a condition; that is to say, it is one of the terms of the contract that the liability to perform it shall only arise or shall cease on the happening of some future event, which may or may not happen, or on one of the parties doing or abstaining from doing some act. When the liability only arises on the happening of the contingency or performance of the condition, the condition is called a condition precedent, and when the liability ceases thereon it is called a condition subsequent (*u*). A promise is not conditional

L. R. 8 C. P. 79; *Newby* v. *Sharpe* (1878), 8 Ch. D. 39, C. A.; *Newington Local Board* v. *Cottingham Local Board* (1879), 12 Ch. D. 725.

(*p*) *Melville* v. *De Wolf* (1855), 4 E. & B. 844; *Reid* v. *Hoskins* (1856), 6 E. & B. 953, Ex. Ch.; *Esposito* v. *Bowden* (1857), 7 E. & B. 763. Compare *Hadley* v. *Clarke* (1799), 8 Term Rep. 259. The effect of a declaration of war is to make trading with the enemy's subjects illegal; see titles ALIENS, Vol. I., p. 301; CONSTITUTIONAL LAW, Vol. VI., p. 443. As to a breach of contract caused by the requisition of a Government inspector under s. 56 of the Explosives Act, 1875 (38 & 39 Vict. c. 17), see title EXPLOSIVES.

(*q*) *Blight* v. *Page* (1801), 3 Bos. & P. 295, n.; *Sjoerds* v. *Luscombe* (1812), 16 East, 201; *Barker* v. *Hodgson* (1814), 3 M. & S. 267; *Ford* v. *Cotesworth* (1870), L. R. 5 Q. B. 544, Ex. Ch.; *Cunningham* v. *Dunn* (1878), 3 C. P. D. 443, C. A.; *Spence* v. *Chodwick* (1847), 10 Q. B. 517; *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q. B. D. 589, C. A. See also the cases decided with reference to charterparties and bills of lading which are cited under title SHIPPING AND NAVIGATION.

(*r*) *Holme* v. *Guppy* (1838), 3 M. & W. 387; *Russell* v. *da Bandeira* (1862), 13 C. B. (N. S.) 149; *Raymond* v. *Minton* (1866), L. R. 1 Exch. 244; *Roberts* v. *Bury Commissioners* (1870), L. R. 5 C. P. 310, Ex. Ch.; *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.* (1875), 10 Ch. App. 515; *Mackay* v. *Dick* (1881), 6 App. Cas. 251; *Learoyd* v. *Brook*, [1891] 1 Q. B. 431; *Dodd* v. *Churton*, [1897] 1 Q. B. 562, C. A.

(*s*) *European and Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.* (1861), 30 L. J. (C. P.) 247.

(*t*) *Warburton* v. *Storr* (1825), 4 B. & C. 103; *M'Intyre* v. *Belcher* (1863), 14 C. B. (N. S.) 654; *Bigland* v. *Skelton* (1810), 12 East, 436; *Re Arthur, Arthur* v. *Wynne* (1880), 14 Ch. D. 603. See p. 438, *post*.

(*u*) As to conditions subsequent in bonds, see title BONDS, Vol. III. p. 84; and as to conditions in charterparties, leases, contracts of insurance, contracts for the sale of goods and of land respectively, see titles SHIPPING AND NAVIGATION; LANDLORD AND TENANT; INSURANCE; SALE OF GOODS; SALE OF LAND.

merely because the time for performance is postponed, or because it is only to be performed on the happening of a future event which must happen at some time, as, for instance, on the death of one of the parties. To constitute a condition there must be contingency as well as futurity.

Nature of conditions.

884. A condition may depend on an event which is dependent upon the will of one of the parties to the contract (*v*) or of a third person (*w*). Where services are performed under an agreement that the remuneration shall be in the discretion of the employer, the question whether the employer has the right to determine whether any remuneration at all shall be paid, so that his decision is a condition precedent to any claim, or merely has the right to fix the amount of the remuneration, is a question of construction and intention in each particular case. If the amount only is left to the decision of the employer, he must exercise his decision in good faith (*x*).

885. Where the condition is that work is to be done to the satisfaction of one of the parties to the contract, this will, as a rule, be construed to mean reasonably to his satisfaction, so that if his approval could not reasonably be withheld the condition is satisfied (*y*); but

(*v*) Thus, the promisor may be free to do or not to do at his pleasure an act on which the promise is conditional, and his liability to perform the promise only arises if he does the act. But the performance of the promise cannot be dependent on his arbitrary will, for in that case there would be no contract at all (*Taylor* v. *Brewer* (1813), 1 M. & S. 290; *Roberts* v. *Smith* (1859), 4 H. & N. 315). As to contracts for payment out of a particular fund, see *Scott* v. *Ebury* (*Lord*) (1867), L. R. 2 C. P. 255; *Coutts & Co.* v. *Irish Exhibition in London* (1891), 7 T. L. R. 313, C. A.; *Steele* v. *Gourley and Davis* (1887), 3 T. L. R. 772, C. A.; *Pilbrow* v. *Pilbrow's Atmospheric Rail. Co.* (1848), 5 C. B. 440; *Williams* v. *Hathaway* (1877), 6 Ch. D. 544.

(*w*) Where property (land or goods) is sold at a valuation to be made by specified third persons, their valuation is a condition precedent, and if for any reason the valuation is not made, as, for instance, because of the death or refusal to act of either of their valuers, or their disagreement, the contract is not enforceable, the court having no power to order a valuation in any other manner than that agreed upon. But if the sale is at a fair valuation, no particular mode of arriving at the value being indicated, the court may enforce the contract and direct the mode of valuation (*Emery* v. *Wase* (1803), 8 Ves. 505; *Milnes* v. *Gery* (1807), 14 Ves. 400; *Firth* v. *Midland Rail. Co.* (1875), L. R. 20 Eq. 100). The same principles apply to an agreement for the valuation of dilapidations (*Babbage* v. *Coulburn* (1882), 9 Q. B. D. 235). If the valuer or valuers appointed by the contract is or are willing to act, the court will compel the party in possession of the property to permit the valuation to be made (*Smith* v. *Peters* (1875), L. R. 20 Eq. 511).

(*x*) Compare *Bryant* v. *Flight* (1839), 5 M. & W. 114; *Bird* v. *M'Gaheg* (1849), 2 Car. & Kir. 703; and *Jewry* v. *Busk* (1814), 5 Taunt. 302, with *Taylor* v. *Brewer* (1813), 1 M. & S. 290, and *Roberts* v. *Smith* (1859), 4 H. & N. 315.

(*y*) *Dallman* v. *King* (1837), 4 Bing. (N. C.) 105; *Braunstein* v. *Accidental Death Insurance Co.* (1861), 1 B. & S. 782. Where the defendants had agreed to take a lease provided the terms of the draft lease were reasonable in their estimation, it was held, the terms not being reasonable, that they were entitled to repudiate the contract without specifying the terms to which they objected (*Wilcox* v. *Redhead* (1880), 49 L. J. (CH.) 539). And see *Hudson* v. *Buck* (1877), 7 Ch. D. 683; *Eadie* v. *Addison* (1882), 52 L. J. (CH.) 80; *Clack* v. *Wood* (1882), 9 Q. B. D. 276, C. A.; *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311, as to the effect of a stipulation that a lease, or the title to property sold, shall be subject to the approval of the proposed lessee's or purchaser's solicitor.

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the language of the contract may be such that he is at liberty to decide the question arbitrarily, in which case his decision can only be impugned on the ground of a want of *bona fides* (*z*). Where the work is to be done to the satisfaction of a third person, no requirement that his decision must be reasonable will be implied, and his refusal to approve the work is conclusive, unless it can be shown that he is acting in collusion with the other party to the contract (*a*).

Notice.

886. Where a promise is conditional upon the happening of a particular event, and there is no express stipulation that notice is to be given of the happening of the event, a condition to that effect will not, as a rule, be implied, except where the nature of the contract requires it; for instance, where the event is a matter which lies within the peculiar knowledge of the other party to the contract or depends upon an option to be exercised by him (*b*).

Demand for performance.

887. No request or demand of performance of a contract is necessary in order to create a right of action for breach thereof, unless such a request or demand is expressly made a condition precedent or the nature of the contract requires that such a condition is to be implied (*c*).

Mutual promises.

888. Where a contract consists of mutual promises, these may be either independent, in which case each party is bound in any event to perform his part of the contract, or they may be dependent on one another, so that the due performance by one party of his promise is a condition precedent to the liability of the other party to perform his promise; or, thirdly, they may be dependent on one another so as to constitute concurrent conditions, the effect of which is to bind each party to be ready and willing to perform his promise on a tender of performance by the other party. Where the promises are independent, the breach of one of them only gives the other party a right of action for damages; but the non-performance of a promise which is a condition precedent

(*z*) *Andrews* v. *Belfield* (1857), 2 C. B. (N. S.) 779; *Stadhard* v. *Lee* (1863), 3 B. & S. 364.

(*a*) *Worsley* v. *Wood* (1796), 6 Term Rep. 710; *Clarke* v. *Watson* (1865), 18 C. B. (N. S.) 278; *Smith* v. *Howden Union* (1890), Hudson on Building Contracts, Vol. II., p. 151. See title BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS, Vol. III., p. 207.

(*b*) *Vyse* v. *Wakefield* (1840), 6 M. & W. 442, affirmed 7 M. & W. 126, Ex. Ch.; *Makin* v. *Watkinson* (1870), L. R. 6 Exch. 25; *Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C. P. D. 507; *Hugall* v. *M'Lean* (1885), 53 L. T. 94, C. A.; *Tredway* v. *Machin* (1904), 91 L. T. 310, C. A.; *Torrens* v. *Walker*, [1906] 2 Ch. 166. In the case of an alternative promise, where the right of electing the branch of the alternative which is to be performed rests with the promisee, notice must be given by him of the mode in which the option has been exercised. See p. 411, *ante*.

(*c*) *Topham* v. *Braddick* (1809), 1 Taunt. 572; *Radford* v. *Smith* (1838), 3 M. & W. 254; *Walton* v. *Mascall* (1844), 13 M. & W. 452; *Brown* v. *Great Eastern Rail. Co.* (1877), 2 Q. B. D. 406; *Bell & Co.* v. *Antwerp, London and Brazil Line*, [1891] 1 Q. B. 103, C. A.; *Newgass* v. *Bottomley* (1903), 19 T. L. R. 309. As to presentment for payment of a bill of exchange or promissory note, see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 530.

releases the other party from his obligation to perform the contract, unless he has received a substantial part of the consideration for his promise, in which case he can only recover damages for breach of the other's promise (*d*).

SECT. 2
Excuses for Non-performance.

Failure to perform.

889. The failure of one party to perform a condition precedent only operates as a discharge of the contract if the other party elects to treat the contract as at an end. He has the option of treating the contract as being still open for further performance, and if he elects to do this he will be taken to have waived the performance of the condition precedent, and can only rely on it as a breach of warranty which entitles him to damages (*e*).

Condition or independent agreement.

890. The question whether the promise of one party is a condition precedent to the liability of the other party or is an independent agreement depends upon the construction of the contract taken as a whole, and is to be determined by the intention of the parties as appearing from the terms of the contract and the surrounding circumstances (*f*). The rule of construction which

(*d*) *Bryant* v. *Beattie* (1838), 5 Scott, 751; *Ellen* v. *Topp* (1851), 6 Exch. 424; *White* v. *Beeton* (1861), 7 H. & N. 42; *Pust* v. *Dowie* (1863), 32 L. J. (Q. B.) 179; *Behn* v. *Burness* (1863), 3 B. & S. 751, Ex. Ch.; *Carter* v. *Scargill* (1875), L. R. 10 Q. B. 564; *Coombe* v. *Greene* (1843), 11 M. & W. 480; *General Billposting Co., Ltd.* v. *Atkinson*, [1909] A. C. 118 (wrongful dismissal of servant entitles him to treat the contract as entirely at an end).

(*e*) *Rippinghall* v. *Lloyd* (1833), 5 B. & Ad. 742; *Behn* v. *Burness*, *supra*; *Bentsen* v. *Taylor, Sons & Co.* (2), [1893] 2 Q. B. 274, C. A. A good deal of confusion arose in the earlier cases on this subject through the indiscriminate use of the term "warranty" (see *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, *per* Lord ABINGER, C.B.); but this term is now recognised as meaning a subsidiary or collateral stipulation the breach of which gives rise to a claim for damages only, as opposed to a condition the breach of which entitles the other party to treat the contract as at an end. Compare ss. 11 and 62 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71); and see title SALE OF GOODS.

(*f*) *Pordage* v. *Cole* (1669), 1 Wms. Saund. 548; *Hotham* v. *East India Co.* (1787), 1 Term Rep. 638; *Stavers* v. *Curling* (1836), 3 Bing. (N. C.) 355; *Bettini* v. *Gye* (1876), 1 Q. B. D. 183; *Bastin* v. *Bidwell* (1881), 18 Ch. D. 238; *Bentsen* v. *Taylor, Sons & Co.* (2), *supra*, *per* BOWEN, L.J., at p. 281; *Kidston & Co.* v. *Monceau Ironworks Co.* (1902), 7 Com. Cas. 82; *Roberts* v. *Brett* (1865), 11 H. L. Cas. 337. "Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and *primâ facie* a condition precedent, is not really vital and may be compensated for in damages, and if they sufficiently expressed such an intention it will not be a condition precedent" (*Bettini* v. *Gye* (1876), 1 Q. B. D. 183, *per* BLACKBURN, J., at p. 187). In some of the older cases there was a tendency to construe promises as being independent, contrary to the intention of the parties (*Glazebrook* v. *Woodrow* (1799), 8 Term Rep. 366, *per* GROSE, J., at p. 371). For examples of the construction of such stipulations, see also *Cooper* v. *London, Brighton, and South Coast Rail. Co.* (1879), 4 Ex. D. 88; *Collins* v. *Locke* (1879), 4 App. Cas. 674, P. C.; *Fearon* v. *Aylesford* (*Earl*) (1884), 14 Q. B. D. 792, C. A.; *Edge* v. *Boileau* (1885), 16 Q. B. D. 117; *Viney* v. *Bignold* (1887), 20 Q. B. D. 172. In a contract for the sale of goods, delivery of the goods and payment of the price are, unless otherwise agreed, concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

SECT. 2. Excuses for Non-performance.

was laid down in the older cases on this subject is that where the promises go to the whole of the consideration on both sides they are mutual conditions, the one precedent to the other; but where they form a part only of the consideration each is an independent promise, the breach of which only entitles the other party to recover damages (*g*). The test which is now applied is whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the party in default a thing different in substance from what the other party has stipulated for, or whether it merely partially affects it and may be compensated for in damages (*h*).

Part performance.

891. Part performance of a condition precedent is not, as a rule, sufficient; but where the contract is divisible, so that it consists in effect of two or more separate contracts, the fact that a condition precedent has not been wholly performed does not relieve the other party to the contract from his liability to perform that part of the contract in respect of which the condition precedent has been satisfied (*i*).

Performance excused.

892. The performance of a condition precedent is excused where the other party has prevented its performance (*k*), or has done something which puts it out of his power to perform his part of the contract, or has intimated that he does not intend to perform it. In the latter case he has made himself liable for a breach of the contract (*l*), and has dispensed with the performance of any promise which was originally a condition precedent to his liability (*m*).

See s. 28 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and title SALE OF GOODS. The question whether a promise constitutes a condition precedent when it depends on the construction of a written contract, is one of law for the court (*George D. Emery Co.* v. *Wells*, [1906] A. C. 515, P. C.).

(*g*) *Boone* v. *Eyre* (1777), 1 Hy. Bl. 273, n.; *Ellen* v. *Topp* (1851), 6 Exch. 424; *Graves* v. *Legg* (1854), 9 Exch. 709.

(*h*) *Poussard* v. *Spiers* (1876), 1 Q. B. D. 410 (the inability through illness of lady, engaged to perform in new opera, to appear at the opening and subsequent three performances, was held to go to the root of the whole contract and to justify rescission). Compare *Bettini* v. *Gye* (1876), 1 Q. B. D. 183, where it was held that a stipulation as to attendance at rehearsals six days before the commencement of an engagement for fifteen weeks to sing at a theatre, and also at concert halls and drawing rooms, was not a condition precedent; *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434, *per* Lord BLACKBURN, at p. 443; *London Guarantie Co.* v. *Fearnley* (1880), 5 App. Cas. 911 (proviso in a fidelity guarantee policy requiring the employer to prosecute the employed in the event of his embezzlement held a condition precedent to a claim on the policy); *Hosking* v. *Pahang Corporation* (1891), 8 T. L. R. 125, C. A. As to the effect of a default in respect of one or more instalments in the case of a contract for the sale of goods to be delivered by instalments, see s. 31 (2) of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and the cases cited at p. 439, *post*, and see title SALE OF GOODS.

(*i*) *Wilson* v. *London, Italian and Adriatic Steam Navigation Co.* (1865), L. R. 1 C. P. 61; *Wilkinson* v. *Clements* (1872), 8 Ch. App. 96.

(*k*) *Cort* v. *Ambergate etc. Rail. Co.* (1851), 17 Q. B. 127; *Bradley* v. *Benjamin* (1877), 46 L. J. (Q. B.) 590; *Mackay* v. *Dick* (1881), 6 App. Cas. 251; *Fisher* v. *Drewett* (1878), 48 L. J. (Q. B.) 32, C. A.; *Prickett* v. *Badger* (1856), 1 C. B. (N. S.) 296; *Thomas* v. *Fredricks* (1847), 10 Q. B. 775.

(*l*) See p. 438, *post*.

(*m*) *Main's Case* (1596), 5 Co. Rep. 21 a; *Jones* v. *Barkley* (1781), 2 Doug.

SUB-SECT. 7.—*Bankruptcy.*

SECT. 2. Excuses for Non-performance.

Discharge by bankruptcy.

893. A contract is not as a rule discharged by the bankruptcy of any of the parties to it (*n*). The property of a bankrupt, including the benefit of his contracts, vests immediately on his adjudication in the trustee in his bankruptcy (*o*), who is entitled to perform any executory contracts, except such as are of a personal nature, for the benefit of the bankrupt's estate (*p*). The property of the bankrupt which is divisible amongst his creditors includes all property that may be acquired by him before his discharge (*q*); but until the trustee intervenes all transactions by a bankrupt, after his bankruptcy and before his discharge, with any person dealing with him *bonâ fide* and for value, in respect of his after-acquired property (not being real property), whether with or without knowledge of the bankruptcy, are valid against the trustee (*r*).

Disclaimer.

894. Unprofitable contracts may be disclaimed by the trustee, and any person injured by the disclaimer is entitled to prove in respect of his injury as a debt under the bankruptcy (*s*). Further, the court, on the application of any person who is as against the trustee entitled to the benefit or subject to the burden of a contract made with the bankrupt, may make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract or otherwise as to the court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy (*t*).

(K. B.) 684; *Planché* v. *Colburn* (1831), 8 Bing. 14; *Pontifex* v. *Wilkinson* (1845), 1 C. B. 75; *Short* v. *Stone* (1846), 8 Q. B. 358; *Lovelock* v. *Franklyn* (1846), 8 Q. B. 371; *Caines* v. *Smith* (1846), 15 M. & W. 189; *Braithwaite* v. *Foreign Hardwood Co.*, [1905] 2 K. B. 543, C. A.; *Bank of China, Japan and the Straits* v. *American Trading Co.*, [1894] A. C. 266, P. C.; *Sands* v. *Clarke* (1849), 8 C. B. 751, at p. 762; *Hochster* v. *De la Tour* (1853), 2 E. & B. 678; *Ripley* v. *M'Clure* (1849), 4 Exch. 345; *Hotham* v. *East India Co.* (1787), 1 Term Rep. 638; *Bowdell* v. *Parsons* (1808), 10 East, 359.

(*n*) An exception to this rule is to be found in the case of a contract of partnership; see title PARTNERSHIP. In the case of any person who is apprenticed or is an articled clerk to a bankrupt, the bankruptcy can be treated by either party as a discharge of the agreement (Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 41). As to the right of an unpaid seller of goods to retain possession of them or to stop them *in transitu* and re-sell them in case of the insolvency of the buyer, see s. 48 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and title SALE OF GOODS.

(*o*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 54, 168. For a full treatment of this subject, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 143.

(*p*) *Lawrence* v. *Knowles* (1839), 5 Bing. (N. C.) 399; *Gibson* v. *Carruthers* (1841), 8 M. & W. 321; *Re Agra Bank, Ex parte Tondeur* (1867), L. R. 5 Eq. 160; *Re Nathan, Ex parte Stapleton* (1879), 10 Ch. D. 586, C. A.; *Re Walker, Ex parte Barter, Ex parte Black* (1884), 26 Ch. D. 510, C. A.; *Re Pooley, Ex parte Rabbidge* (1878), 8 Ch. D. 367, C. A.

(*q*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.

(*r*) *Cohen* v. *Mitchell* (1890), 25 Q. B. D. 262, C. A.

(*s*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (1), (7).

(*t*) *Ibid.*, s. 55 (5).

SECT. 3.
Breach of Contract.

SECT. 3.—*Breach of Contract.*

SUB-SECT. 1.—*Breach by Anticipation.*

Anticipatory breach.

895. A breach of contract may take place before the time fixed for performance of the contract has arrived. Thus, if the promisor by his own act disables himself from performing his promise, the other party is entitled to treat the contract as at an end and to sue him for damages for breach of contract without waiting until the time fixed for performance and without further performing his part of the contract (*a*).

Future performance.

896. Where the promise is to be performed on a given future day, the mere fact that the promisor is incapable of performing it before that day does not constitute a breach of the contract; but where the contract involves a continuing ability to perform the promise a breach is committed as soon as the promisor has put it out of his power to perform it (*b*), even if the disability is not necessarily permanent and he may subsequently be in a position to perform his promise (*c*).

Repudiation.

897. Where a contract is to be performed on a future day, or the performance is dependent on a contingency, and one of the parties repudiates the contract and shows that he does not intend to perform it, the other party is entitled to sue him for breach of the contract without waiting for the time fixed for performance and is absolved from further performance of his part of the contract, and if he elects to do this the party in default is not entitled to an opportunity of changing his mind (*d*). In such a case the contract is completely determined, and the party who is in default cannot

(*a*) *Jones* v. *Barkley* (1781), 2 Doug. (K. B.) 684; *Warburton* v. *Storr* (1825), 4 B. & C. 103; *Lovelock* v. *Franklyn* (1846), 8 Q. B. 371; *M'Intyre* v. *Belcher* (1863), 14 C. B. (N. S.) 654; *Re Imperial Wine Co., Shirreff's Case* (1872), L. R. 14 Eq. 417; *Re Patent Floor Cloth Co., Dean and Gilbert's Claim* (1872), 41 L. J. (CH.) 476; *Synge* v. *Synge*, [1894] 1 Q. B. 466, C. A. In such a case the promisor is taken to have waived the performance by the other party of any condition precedent to his liability to perform his promise (*Main's Case* (1596), 5 Co. Rep. 21 a; *Planché* v. *Colburn* (1831), 8 Bing. 14; *Pontifex* v. *Wilkinson* (1845), 1 C. B. 75; *Ripley* v. *M'Clure* (1849), 4 Exch. 345; *Cort* v. *Ambergate etc. Rail. Co.* (1851), 17 Q. B. 127; *Bradley* v. *Benjamin* (1877), 46 L. J. (Q. B.) 590; *Braithwaite* v. *Foreign Hardwood Co.*, [1905] 2 K. B. 543, C. A.). See p. 422, *ante*.

(*b*) *Lovelock* v. *Franklyn*, *supra*.

(*c*) *Ford* v. *Tiley* (1827), 6 B. & C. 325 (A. having agreed to grant a lease to B. as from a future date, in the meantime joined in leasing the property to C.); *Short* v. *Stone* (1846), 8 Q. B. 358 (A. having promised to marry B., married C.); *Caines* v. *Smith* (1846), 15 M. & W. 189 (similar case); *Bowdell* v. *Parsons* (1808), 10 East, 359 (A. having agreed for the sale of goods to B., sold them to C.).

(*d*) *Hochster* v. *De la Tour* (1853), 2 E. & B. 678; *Danube etc. Rail. Co.* v. *Xenos* (1863), 13 C. B. (N. S.) 825; *Frost* v. *Knight* (1872), L. R. 7 Exch. 111, Ex. Ch.; *Rhymney Rail. Co.* v. *Brecon and Merthyr Tydfil Junction Rail. Co.* (1900), 69 L. J. (CH.) 813, C. A. And see p. 422, *ante*. In order to amount to a repudiation there must be conduct showing clearly an intention not to fulfil the contract when the time comes, and a party is not bound before the time fixed for performance to give the other party a definite answer

insist upon the performance by the other party even of a stipulation which is collateral to the main purpose of the contract (*e*).

The repudiation of the contract by one party does not of itself discharge the contract, but the other party has the option of treating the contract as at an end, or of waiting until the time for performance has arrived, before making any claim for breach of contract (*f*). If he elects to wait, he remains liable to perform his part of the contract, and enables the party in default not only to perform the contract notwithstanding his previous repudiation of it, but to take advantage of any supervening circumstance which would justify him in declining to perform it (*g*).

Partial refusal to perform.

898. Not every refusal to perform a material part of the contract amounts to a repudiation which entitles the other party to treat the contract as at an end; there must be a refusal to perform something which goes to the root or essence of the contract (*h*). The question whether the refusal to perform any particular part of the contract amounts to a repudiation of the whole contract or not is one of construction. Thus, in the case of a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, if the seller makes defective deliveries in respect of one or more instalments or the buyer neglects or refuses to take delivery of or to pay for one or more instalments, it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated (*i*).

Delivery by instalments.

whether he intends to fulfil the contract or not (*Ripley* v. *M'Clure* (1849), 4 Exch. 345; *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434). See also *per* Lord COLERIDGE, C.J., in *Freeth* v. *Burr* (1874), L. R. 9 C. P. 208, and *per* Lord COLLINS in *General Billposting Co., Ltd.* v. *Atkinson*, [1909] A. C. 118, at p. 122. Where it is doubtful whether what has been done releases the other party from his liability under the contract, he is entitled to get a judicial decision of the question by bringing an action claiming a declaration that he is not bound to perform the contract (*Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (1904), 9 Com. Cas. 289).

(*e*) *General Billposting Co., Ltd.* v. *Atkinson, supra.* As to the right of the other party to payment for any work done by him under the contract, see p. 440, *post.*

(*f*) *Reid* v. *Hoskins*, *Avery* v. *Bowden* (1856), 6 E. & B. 953; *Barrick* v. *Buba* (1857), 2 C. B. (N. S.) 563; *Johnstone* v. *Milling* (1886), 16 Q. B. D. 460, C. A.; *Ellis* v. *Pond*, [1898] 1 Q. B. 426, C. A.; and see *Dominion Coal Co.* v. *Dominion Iron & Steel Co.* (1909), 25 T. L. R. 309, P. C. As to the assessment of damages in such cases, see *Leigh* v. *Paterson* (1818), 8 Taunt. 540; *Phillpotts* v. *Evans* (1839), 5 M. & W. 475; *Birchgrove Steel Co.* v. *Shaws Brow Iron Co.* (1891), 7 T. L. R. 246, H. L.; *Roth & Co.* v. *Taysen, Townsend & Co.* (1896), 1 Com. Cas. 306, C. A.; *Michael* v. *Hart & Co.*, [1902] 1 K. B. 482, C. A.; and title DAMAGES.

(*g*) *Hochster* v. *De la Tour* (1853), 2 E. & B. 678; *Frost* v. *Knight* (1872), L. R. 7 Exch. 111, Ex. Ch.; *Reid* v. *Hoskins*, *Avery* v. *Bowden*, *supra.*

(*h*) *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co., supra, per* Lord BLACKBURN, at p. 443; *Rhymney Rail. Co.* v. *Brecon and Merthyr Tydfil Junction Rail. Co.* (1900), 69 L. J. (CH.) 813, C. A.; *Cornwall* v. *Henson*, [1900] 2 Ch. 298, C. A., *per* COLLINS, L.J., at p. 303; *United Shoe Machinery Co. of Canada* v. *Brunet* (1909), 25 T. L. R. 442, P. C.

(*i*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 31 (2); *Withers* v. *Reynolds*

SECT. 3. Breach of Contract.

Declaration of insolvency.

899. The bankruptcy or insolvency of one of the parties to a contract does not of itself put an end to the contract (*k*), nor does a declaration of insolvency by one of the parties entitle the other party to treat the contract as at an end, unless the declaration is made under such circumstances as to show that the party by whom it is made either cannot carry out the contract or does not intend to do so (*l*); but if one party gives notice to the other of his insolvency, and does nothing to show that he intends to stand by the contract, the other party is entitled to assume that he intends to abandon the contract and has the option of insisting upon the performance of the contract, or of treating it as at an end (*m*).

SUB-SECT. 2.—*Effect of Breach.*

Effect of breach.

900. A breach of contract by one party, that is, a failure to perform the contract without sufficient excuse, gives the other party a right of action for damages, but does not release him from liability to perform his part of the contract, except where the contract consists of mutual promises which are dependent on one another, so that the due performance by each party of his promise is a condition precedent to the liability of the other party to perform his promise. Even in that case, the other party is not discharged if he has received a substantial part of the consideration for his promise, or has elected to treat the contract as still subsisting (*n*).

Where a contract is discharged by breach, anything done by the party in default after breach is available only in mitigation of the damages accruing from the breach, and cannot be relied on as a performance of the contract (*o*).

Quantum meruit.

901. Where one party has disabled himself from performing the contract or has repudiated it, the other party is entitled to treat the contract as at an end (*p*). In that case he is not only entitled to damages for breach of contract, but if he has performed his part of the contract wholly or in part he has a right to sue on a *quantum meruit* for what he has done. This right does not arise out of the

(1831), 2 B. & Ad. 882; *Hoare* v. *Rennie* (1859), 5 H. & N. 19; *Brown* v. *Muller* (1872), L. R. 7 Exch. 319; *Simpson* v. *Crippin* (1872), L. R. 8 Q. B. 14; *Roper* v. *Johnson* (1873), L. R. 8 C. P. 167; *Freeth* v. *Burr* (1874), L. R. 9 C. P. 208; *Bloomer* v. *Bernstein* (1874), L. R. 9 C. P. 588; *Brandt* v. *Lawrence* (1876), 1 Q. B. D. 344, C. A.; *Reuter* v. *Sala* (1879), 4 C. P. D. 239, C. A.; *Honck* v. *Muller* (1881), 7 Q. B. D. 92, C. A.; *Dickinson* v. *Fanshaw* (1892), 8 T. L. R. 271, C. A.; *Booth* v. *Bowron* (1892), 8 T. L. R. 641; *Ebbw Vale Steel etc. Co.* v. *Blaina Iron etc. Co.* (1901), 6 Com. Cas. 33; and see title SALE OF GOODS.

(*k*) See p. 437, *ante*.

(*l*) *Mess* v. *Duffus* (1901), 6 Com. Cas. 165.

(*m*) *Re Edwards, Ex parte Chalmers* (1873), 8 Ch. App. 289; *Morgan* v. *Bain* (1874), L. R. 10 C. P. 15; *Re Phœnix Bessemer Steel Co., Ex parte Carnforth Hæmatite Iron Co.* (1876), 4 Ch. D. 108, C. A. See also *Tolhurst* v. *Associated Portland Cement Co.*, [1903] A. C. 414.

(*n*) See p. 439, *ante*. As to excuses for non-performance, see p. 417, *ante*.

(*o*) *Bastin* v. *Bidwell* (1881), 18 Ch. D. 238, at p. 252. Thus, a plea of tender is only available as a defence to an action if the tender was made before breach of the contract; see p. 417, *ante*.

(*p*) See p. 438, *ante*.

original contract, but is based on an implied promise by the other party arising from the acceptance of an executed consideration (*q*).

SUB-SECT. 3.—*Remedies for Breach.*

Remedies.

902. A breach of contract always gives the injured party a right of action for damages (*r*). In certain cases where damages would be an inadequate remedy application may be made for a decree of specific performance (*s*), or, where the contract is in a negative form, for an injunction to restrain the breach of the contract (*t*).

SECT. 4.—*Discharge of Right of Action for Breach of Contract.*

SUB-SECT. 1.—*Accord and Satisfaction.*

Accord and satisfaction.

903. After a breach of contract has taken place the contract cannot be rescinded, but the cause of action that arises from the breach may be discharged by accord and satisfaction, that is to say, by an agreement between the parties providing for the acceptance by the promisee of something else than the remedy to which he is entitled by law, coupled with performance of the consideration agreed upon (*a*).

Accord.

Accord and satisfaction involves an agreement, and the question whether an accord has been arrived at is one of fact, not of law. Thus, where a creditor keeps a cheque which has been sent to him by his debtor in discharge of the amount due, it is a question of fact whether the cheque is taken in satisfaction of the debt or merely as a payment on account leaving a balance due (*b*).

The agreement need not be in writing, even though the subject-matter is such that if it were an executory contract it would be required by the Statute of Frauds to be in writing (*c*); nor need it be in writing or under seal in cases where the original contract was under seal (*d*).

(*q*) *Planché* v. *Colburn* (1831), 8 Bing. 14; *Prickett* v. *Badger* (1856), 1 C. B. (N. S.) 296; *Inchbald* v. *Western Neilgherry Coffee Co.* (1864), 17 C. B. (N. S.) 733; *O'Neil* v. *Armstrong, Mitchell & Co.*, [1895] 2 Q. B. 418, C. A.; *Lockwood* v. *Levick* (1860), 8 C. B. (N. S.) 603; *Hill* v. *Kitching* (1846), 3 C. B. 299; and see p. 387, *ante*.

(*r*) As to the measure of damages, the distinction between a penalty and liquidated damages, interest payable as damages, and generally as to the principles upon which damages are to be assessed, see title DAMAGES.

(*s*) As to the cases in which this remedy is available and the principles upon which such applications are dealt with, see title SPECIFIC PERFORMANCE.

(*t*) As to the principles upon which injunctions are granted to restrain breaches of contract, and the procedure upon such applications, see title INJUNCTION.

(*a*) *Edwards* v. *Chapman* (1836), 1 M. & W. 231.

(*b*) *Ackroyd* v. *Smithies* (1885), 54 L. T. 130 (cheque sent "to balance account," retained "on account" and cashed; held, no satisfaction); *Day* v. *McLea* (1889), 22 Q. B. D. 610, C. A. (cheque sent in satisfaction retained "on account"; held, no satisfaction); *Nathan* v. *Ogdens Ltd.* (1905), 94 L. T. 126, C. A. (cheque payable to order, having on the back the words "received from —— this cheque for £—— being my share of the second and final distribution," ignored by recipient; held, not a satisfaction).

(*c*) *Lavery* v. *Turley* (1860), 6 H. & N. 239.

(*d*) *Blake's Case* (1605), 6 Co. Rep. 43 b; *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537.

SECT. 4. Discharge of Right of Action for Breach of Contract.

Satisfaction.

904. Where the amount due is uncertain or disputed, payment of any sum agreed between the parties is a satisfaction of the liability (*e*); but where a liquidated amount is undisputedly due, payment of a smaller amount cannot be relied on as a satisfaction unless the payment is made at an earlier date or in a different manner than the creditor is legally entitled to insist on, because there is no consideration for the relinquishment of the residue (*f*). For the same reason an agreement to accept payment of an existing debt by instalments is not binding on the creditor (*g*). But it is otherwise if there is a consideration for the acceptance of the smaller sum in satisfaction, other than the payment of the smaller sum (*h*).

Bills of exchange.

To the rule that the payment of a smaller sum cannot operate as a satisfaction of a debt for a larger sum there is an exception in the case of a party to a bill of exchange or a promissory note, who is discharged if the holder absolutely and unconditionally renounces his rights against him at or after the maturity of the bill or note (*i*).

In any case, whether the amount due is liquidated or unliquidated, the acceptance by the creditor of something of a different nature from that to which he was entitled may be a satisfaction of the liability; and in such a case no inquiry will be made into the value of the consideration (*j*). Thus, a cheque or other negotiable instrument may be taken in satisfaction of a debt for a larger amount than that of the bill or note, even if the debtor himself is the only person who is liable on the instrument (*k*).

(*e*) *Wilkinson* v. *Byers* (1834), 1 Ad. & El. 106; *Cooper* v. *Parker* (1855), 15 C. B. 822, Ex. Ch. (payment of smaller sum, coupled with an agreement to abandon a defence and pay costs, is a satisfaction, whether the claim is liquidated or unliquidated, and though the defence may be unfounded); *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, C. A.

(*f*) *Cumber* v. *Wane* (1721), 1 Stra. 426; 1 Smith, L. C., 11th ed., 338; *Down* v. *Hatcher* (1839), 10 Ad. & El. 121; *Pinnel's Case* (1602), 5 Co. Rep. 117 a; *Fitch* v. *Sutton* (1804), 5 East, 230; *Foakes* v. *Beer* (1884), 9 App. Cas. 605 (agreement by judgment creditor not to take any proceedings on the judgment in the event of the debt being paid by specified instalments, held ineffective to prevent the creditor from claiming interest on the judgment, although the instalments were duly paid in accordance with the agreement); *Underwood* v. *Underwood*, [1894] P. 204, C. A. But where a landlord for some years accepted payments of rent from his tenant, subject to certain allowances in respect of land tax, it was held that that was not the same as partial payment, but that the effect was the same as if the landlord had been paid the full amount of the rents, and repaid the sums claimed for allowances to the tenant, the landlord being fully aware of the circumstances (*Bramston* v. *Robins* (1826), 4 Bing. 11).

(*g*) *McManus* v. *Bark* (1870), L. R. 5 Exch. 65; *Hookham* v. *Mayle* (1906), 22 T. L. R. 241.

(*h*) *Cooper* v. *Parker*, *supra*.

(*i*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 62, 89. See title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 551.

(*j*) *Pinnel's Case* (1602), 5 Co. Rep. 117 a; *Smith* v. *Trowsdale* (1854), 3 E. & B. 83; *Cooper* v. *Parker* (1855), 15 C. B. 822, Ex. Ch.

(*k*) *Sard* v. *Rhodes* (1836), 1 M. & W. 153; *Sibree* v. *Tripp* (1846), 15 M. & W. 23; *Curlewis* v. *Clark* (1849), 3 Exch. 375; *Goddard* v. *O'Brien* (1882), 9 Q. B. D. 37; *Bidder* v. *Bridges* (1887), 37 Ch. D. 406, C. A. Compare *Sprange* v. *Lee*, [1908] 1 Ch. 424.

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905. An accord without satisfaction has no legal effect. The original cause of action is not discharged so long as the satisfaction agreed upon remains executory (*l*). A tender of performance of the consideration is not sufficient (*m*). If, however, it can be shown that what the creditor accepted in satisfaction was the debtor's promise, and not the performance of that promise, the original cause of action is discharged from the time when the promise was made (*n*).

Accord without satisfaction.

906. An accord is not a contract, and performance of it cannot be enforced by action against the debtor, who remains liable on the original cause of action until the satisfaction has been executed (*o*). But a compromise of a disputed cause of action, by which the creditor agrees not to sue the debtor, may amount to an agreement which is binding on both parties, and in that case it is enforceable by action (*p*).

Accord not a contract.

In the same way, although an agreement by which a creditor accepts part of his debt in satisfaction of the whole is not a discharge of his right of action, yet if other creditors are made parties to the agreement, and all agree to accept a composition for their claims, this is not a mere accord, but a binding contract, the consideration for each creditor's promise being the undertaking by the other creditors to forego part of their claims (*q*).

Composition with creditors.

So the separate liability of one of several joint debtors may be accepted in discharge of the joint liability of all (*r*); and the liability of the original debtor may be discharged by the acceptance of the liability of a third person in his place under a new agreement to which the third person is a party (*s*), or by a payment made by

Novation.

(*l*) *Peytoe's Case* (1611), 9 Co. Rep. 77 b; *James* v. *David* (1793), 5 Term Rep. 141; *Norris* v. *Aylett* (1809), 2 Camp. 329; *Allies* v. *Probyn* (1835), 2 Cr. M. & R. 408; *Bayley* v. *Homan* (1837), 3 Bing. (N. C.) 915; *Wray* v. *Milestone* (1839), 5 M. & W. 21; *Collingbourne* v. *Mantell* (1839), 5 M. & W. 289; *Gifford* v. *Whittaker* (1844), 6 Q. B. 249; *Griffiths* v. *Owen* (1844), 13 M. & W. 58; *Carter* v. *Wormald* (1847), 1 Exch. 81; *Graham* v. *Gibson* (1850), 4 Exch. 768.

(*m*) *Gabriel* v. *Dresser* (1855), 15 C. B. 622. A plea of tender is only available as a defence to an action where the tender was made before breach of the contract, except in the case of a tender of money in discharge of a debt. See p. 420, *ante*.

(*n*) *Sibree* v. *Tripp* (1846), 15 M. & W. 23; *Hall* v. *Flockton* (1851), 16 Q. B. 1039, Ex. Ch.; *Evans* v. *Powis* (1847), 1 Exch. 601. Compare *Edwards* v. *Hancher* (1875), 1 C. P. D. 111.

(*o*) *Lynn* v. *Bruce* (1794), 2 Hy. Bl. 317; *Bridgman* v. *Dean* (1852), 7 Exch. 199.

(*p*) *Longridge* v. *Dorville* (1821), 5 B. & Ald. 117; *Stracy* v. *Bank of England* (1830), 6 Bing. 754; *Crowther* v. *Farrer* (1850), 15 Q. B. 677; *Henderson* v. *Stobart* (1850), 5 Exch. 99.

(*q*) *Steinman* v. *Magnus* (1809), 11 East, 390; *Eyles* v. *Ellis* (1827), 4 Bing. 112; *Good* v. *Cheesman* (1831), 2 B. & Ad. 328; *Evans* v. *Powis* (1847), 1 Exch. 601; *Boyd* v. *Hind* (1857), 1 H. & N. 938, Ex. Ch.; *Couldery* v. *Bartrum* (1881), 19 Ch. D. 394, C. A.; *Pfleger* v. *Browne* (1860), 28 Beav. 391; *Kitchin* v. *Hawkins* (1866), L. R. 2 C. P. 22. As to the rights of creditors under an agreement for a composition, see Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), and title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 325; see also that title as to compositions made under the Bankruptcy Acts.

(*r*) *Lyth* v. *Ault* (1852), 7 Exch. 669.

(*s*) *Cuxon* v. *Chadley* (1824), 3 B. & C. 591. Such an agreement, if made before breach, has the effect of rescinding the original contract, and is called novation. See p. 505, *post*.

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a third person under such an agreement, even if the amount agreed to be paid is less than that of the original debt (*t*).

Joint and several debtors.

907. Accord and satisfaction effected with one of several joint creditors discharges the joint debt (*u*). Accord and satisfaction between the creditor and one of several debtors who are liable jointly or jointly and severally discharges the other debtors, unless it appears from the terms of the agreement or the surrounding circumstances that the creditor intended to reserve his rights against them; and this rule applies equally whether the obligation arises on a judgment or on any other security (*v*).

Fraud.

908. The original cause of action is not discharged if the accord and satisfaction was effected by the fraud of the debtor (*w*), or if the satisfaction has been rendered nugatory by his act or default (*x*).

SUB-SECT. 2.—*Payment* (*a*).

(1) *In General.*

Payment.

909. A right of action for breach of contract may be discharged by payment, if this is accepted in satisfaction; but where a liquidated amount is due, payment of a smaller amount cannot be relied on as a satisfaction, unless the payment is made at an earlier date or in a different manner from that to which the creditor is already entitled (*b*).

Settlement in account.

Payment need not necessarily be made in money; thus, the delivery of goods which are taken by the creditor in satisfaction of the debt is equivalent to payment (*c*), and a settlement of accounts by which items on one side are agreed to be set off against items on the other side amounts to payment of the sums stated in the account (*d*). But a statement and settlement of accounts where the

(*t*) *Welby* v. *Drake* (1825), 1 C. & P. 557.

(*u*) *Wallace* v. *Kelsall* (1840), 7 M. & W. 264; *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537; *Powell* v. *Brodhurst*, [1901] 2 Ch. 160. See also the decisions as to the effect of a payment made to one of several joint creditors, p. 445, *post*; and as to a release granted by one of them, p. 456, *post*.

(*v*) *Nicholson* v. *Revill* (1836), 4 Ad. & El. 675; *Re E. W. A.*, [1901] 2 K. B. 642, C. A. See also the decisions as to the effect of a payment made by one of several joint debtors, p. 445, *post*; and as to a release granted to one of them, p. 455, *post*.

(*w*) *Hirschfeld* v. *London, Brighton, and South Coast Rail. Co.* (1876), 2 Q. B. D. 1.

(*x*) *Turner* v. *Browne* (1846), 3 C. B. 157.

(*a*) See also title SALE OF GOODS as to payment generally.

(*b*) Payment in this case is a form of accord and satisfaction, as to which see p. 441, *ante*. As to the right of a defendant who is sued for the recovery of a debt or damages to pay money into court by way of satisfaction, see R. S. C., Ord. 22, and title PRACTICE AND PROCEDURE.

(*c*) *Hands* v. *Burton* (1808), 9 East, 349; *Saxty* v. *Wilkin* (1843), 11 M. & W. 622; *Smith* v. *Battams* (1857), 26 L. J. (EX.) 232.

(*d*) *Kinnerley* v. *Hossack* (1809), 2 Taunt. 170; *Cleworth* v. *Pickford* (1840), 7 M. & W. 314; *Callander* v. *Howard* (1850), 10 C. B. 290; *Livingstone* v. *Whiting* (1850), 15 Q. B. 722. Where a company agreed with the vendor, or with any other person to whom it was indebted, to set off against the debt the amount payable in respect of shares subscribed for by the vendor or creditor, that was held to be a payment for the shares in cash within the meaning of

items are all on one side does not constitute a payment so as to preclude either party from showing that the accounts were wrong (*e*). The transfer, in the books of a bank, of a sum of money from the account of a debtor to that of his creditor, made with the consent of both parties, operates as a payment (*f*).

Payment by a debtor to a third person at the request of the creditor is equivalent to payment to the creditor (*g*).

Payment to agent.

910. Payment made in the ordinary course of business to an agent of the creditor discharges the debt if the agent is authorised or held out as having authority to receive payment (*h*). As a general rule, a person who is authorised to receive payment has no implied authority to take a cheque or to receive payment otherwise than in money, but such authority may be implied from the conduct of the principal or the usual course of business (*i*). Where a cheque taken by an agent has been paid, the transaction is equivalent to payment in cash (*k*).

Set-off.

An authority given to an agent to receive payment does not authorise a settlement of accounts between him and the debtor, by setting off a debt due from the agent to the debtor (*l*), unless this can be justified by a known usage which is binding upon the creditor (*m*).

Joint and several debts.

911. Payment to one of several joint creditors discharges the joint debt (*n*); and payment by one of several joint debtors

s. 25 of the Companies Act, 1867 (30 & 31 Vict. c. 131), which was repealed and replaced by s. 7 of the Companies Act, 1900 (63 & 64 Vict. c. 48), and is now contained in s. 88 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69); *Re Harmony and Montague Tin and Copper Mining Co., Spargo's Case* (1873), 8 Ch. App. 407; *Larocque* v. *Beauchemin*, [1897] A. C. 358, P. C.; *North Sydney Investment and Tramway Co.* v. *Higgins*, [1899] A. C. 263, P. C.; and see title COMPANIES, Vol. V.

(*e*) *Perry* v. *Attwood* (1856), 25 L. J. (Q. B.) 408.

(*f*) *Bolton* v. *Richard* (1795), 6 Term Rep. 139; *Bodenham* v. *Purchas* (1818), 2 B. & Ald. 39.

(*g*) *Roper* v. *Bumford* (1810), 3 Taunt. 76. See also *Page* v. *Meek* (1862), 32 L. J. (Q. B.) 4; and compare *Commercial Bank of Australia* v. *Official Assignee of the Estate of Wilson & Co.*, [1893] A. C. 181, P. C.

(*h*) As to the authority of an agent in general, see title AGENCY, Vol. I., p. 145; and as to the authority of an agent of a particular class, such as an auctioneer or a solicitor, see separate titles.

(*i*) *Williams* v. *Evans* (1866), L. R. 1 Q. B. 352; *Hogarth* v. *Wherley* (1875), L. R. 10 C. P. 630; *Charles* v. *Blackwell* (1877), 2 C. P. D. 151, C. A.; *Papé* v. *Westacott*, [1894] 1 Q. B. 272, C. A.; *Blumberg* v. *Life Interests etc. Corporation*, [1897] 1 Ch. 171, affirmed on the facts [1898] 1 Ch. 27, C. A. And see title AGENCY, Vol. I., p. 145.

(*k*) *Bridges* v. *Garrett* (1870), L. R. 5 C. P. 451, Ex. Ch.; *Walker* v. *Barker* (1900), 16 T. L. R. 393.

(*l*) *Bartlett* v. *Pentland* (1830), 10 B. & C. 760; *Barker* v. *Greenwood* (1837), 2 Y. & C. (EX.) 414; *Pearson* v. *Scott* (1878), 9 Ch. D. 198; *Anderson* v. *Sutherland* (1897), 2 Com. Cas. 65.

(*m*) *Stewart* v. *Aberdein* (1838), 4 M. & W. 211; *Catterall* v. *Hindle* (1867), L. R. 2 C. P. 368, Ex. Ch. See title CUSTOM AND USAGES.

(*n*) *Wallace* v. *Kelsall* (1840), 7 M. & W. 264; *Husband* v. *Davis* (1851), 10 C. B. 645; *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537; *Powell* v. *Brodhurst*, [1901] 2 Ch. 160. Compare *Stone* v. *Marsh* (1827), 6 B. & C. 551. And see title PARTNERSHIP. See also the decisions as to the effect of an accord and satisfaction with one of several joint creditors, p. 444, *ante*; and as to release granted by one of them, p. 456, *post*.

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discharges all, whether the liability is joint or joint and several (*o*); but a compromise of a claim against one does not release the others if the creditor reserves his rights against them (*p*).

Payment by third person.

912. Payment by a third person is not sufficient to discharge a debt unless it is made by him as agent for and on behalf of the debtor and with his prior authority or is subsequently ratified by the debtor (*q*). A payment made on behalf of the debtor may be ratified by him even after action brought, and a plea of payment is a sufficient ratification (*r*); but the creditor and the person who has made the payment may agree to cancel what has taken place between them at any time before the debtor has affirmed it, and if they do so it is then too late for the debtor to ratify the payment (*s*).

By garnishee.

Payment made by a garnishee under compulsion of law in garnishee proceedings operates as a valid discharge to him as against the judgment debtor, even though the proceedings may be set aside, or the judgment or order reversed (*t*). But a garnishee cannot discharge himself from liability to his creditor by any payment to a third person which is not made either by compulsion of law or with the consent of his creditor (*u*).

Proof of payment.

913. A payment may be proved either by the production of a receipt or by any other evidence from which the fact of payment may be inferred (*w*); and a payment may be presumed from the length of time which has elapsed since the debt became due, even though it may not be barred by the Statute of Limitations, in the absence of any explanation of the delay (*x*). A receipt not under seal is not conclusive evidence of payment, but merely an admission, and evidence is admissible to prove the intention with which it was given and whether any payment was in fact made, and if so, on what terms (*y*).

Receipt.

(*o*) *Beaumont* v. *Greathead* (1846), 2 C. B. 494; *Thorne* v. *Smith* (1851), 10 C. B. 659; *Re E. W. A.*, [1901] 2 K. B. 642, C. A. See also the decisions as to the effect of an accord and satisfaction effected by one of several joint debtors, p. 444, *ante*, and as to a release granted to one of them, p. 455, *post*.

(*p*) *Watters* v. *Smith* (1831), 2 B. & Ad. 889; *Field* v. *Robins* (1838), 8 Ad. & El. 90; *Re Armitage, Ex parte Good* (1877), 5 Ch. D. 46, C. A.

(*q*) *M'Intyre* v. *Miller* (1845), 13 M. & W. 725; *Belshaw* v. *Bush* (1851), 11 C. B. 191; *James* v. *Isaacs* (1852), 12 C. B. 791; *Kemp* v. *Balls* (1854), 10 Exch. 607; *Simpson* v. *Eggington* (1855), 10 Exch. 845; *Lucas* v. *Wilkinson* (1856), 1 H. & N. 420; *Keighley, Maxsted & Co.* v. *Durant*, [1901] A. C. 240; *Re Rowe, Ex parte Derenburg & Co.*, [1904] 2 K. B. 483, C. A.

(*r*) *Belshaw* v. *Bush, supra*.

(*s*) *Walter* v. *James* (1871), L. R. 6 Exch. 124.

(*t*) R. S. C., Ord. 45, r. 7; *Re Smith, Ex parte Brown* (1888), 20 Q. B. D. 321, C. A.; *Turnbull* v. *Robertson* (1878), 38 L. T. 389; *Culverhouse* v. *Wickens* (1868), L. R. 3 C. P. 295. See title EXECUTION.

(*u*) *London Corporation* v. *London Joint Stock Bank* (1881), 6 App. Cas. 393, *per* Lord BLACKBURN, at p. 415.

(*w*) *Mountfort* v. *Harper* (1847), 16 L. J. (EX.) 184 (proof that the creditor received the proceeds of a cheque drawn by the debtor held sufficient evidence of payment without any proof that the creditor received the cheque from the debtor); *Egg* v. *Barnett* (1800), 3 Esp. 196.

(*x*) *Cooper* v. *Turner* (1819), 2 Stark. 497.

(*y*) *Wyatt* v. *Hertford* (*Marquis*) (1802), 3 East, 147; *Skaife* v. *Jackson* (1824), 3 B. & C. 421; *Graves* v. *Key* (1832), 3 B. & Ad. 313; *Farrar* v. *Hutchinson*

(2) *By Negotiable Instrument.*

914. Where a negotiable security is given by a debtor to his creditor, the question upon what terms it is given is one of fact, depending on the intention of the parties (*z*). It may be given as a collateral security (*a*), but the presumption is that it is given by way of payment (*b*).

Payment by negotiable instrument.

A creditor is not bound to accept payment of a debt otherwise than in current coin, or, in the case of a debt exceeding £5, in notes of the Bank of England (*c*); and if he takes a bill, note, or cheque in payment, he may either accept it in satisfaction of the debt, in which case he takes the risk of its being dishonoured (*d*), or may accept it as a conditional payment only, the effect of which is to suspend his remedies during the currency of the instrument (*e*).

Conditional payment.

The presumption, in the absence of a clear indication of a contrary intention, is that payment by means of a bill, note, or cheque

(1839), 9 Ad. & El. 641; *Foster* v. *Dawber* (1851), 6 Exch. 839; *Bowes* v. *Foster* (1858), 2 H. & N. 779; *Lee* v. *Lancashire and Yorkshire Rail. Co.* (1871), 6 Ch. App. 527; *Ellen* v. *Great Northern Rail. Co.* (1901), 17 T. L. R. 453, C. A.; *Oliver* v. *Nautilus Steam Shipping Co.*, [1903] 2 K. B. 639, 648, C. A.; *Re W. W. Duncan & Co.*, [1905] 1 Ch. 307; *Nathan* v. *Ogdens, Ltd.* (1905), 93 L. T. 553, affirmed 94 L. T. 126, C. A. A receipt not under seal, even if intended as a discharge, will not have that effect in the absence of payment or an accord and satisfaction (see p. 454, *post*).

(*z*) *Goldshede* v. *Cottrell* (1836), 2 M. & W. 20; *Re Boys, Eedes* v. *Boys, Ex parte Hop Planters Co.* (1870), L. R. 10 Eq. 467; *Palmer* v. *Bramley*, [1895] 2 Q. B. 405, C. A.

(*a*) *Drake* v. *Mitchell* (1803), 3 East, 251; *Pring* v. *Clarkson* (1822), 1 B. & C. 14; *Peacock* v. *Pursell* (1863), 14 C. B. (N. S.) 728.

(*b*) *Re Boys, Eedes* v. *Boys, Ex parte Hop Planters Co., supra.* It has been suggested that this presumption does not arise where a bill is given for a specialty debt (*Belshaw* v. *Bush* (1851), 11 C. B. 191, at p. 206). There does not appear, however, to be any authority for excepting this case from the general rule; see *Baker* v. *Walker* (1845), 14 M. & W. 465; *Palmer* v. *Bradley*, [1895] 2 Q. B. 405, C. A.

(*c*) See note (*o*) on p. 419, *ante*, as to tender of Bank of England notes. Where a debtor, in answer to a letter demanding payment, sent a post-office order in which the creditor was described by a wrong Christian name, and the creditor kept the order, but did not cash it, though he was informed by the post-office that he might do so at any time on signing in the name of the payee, it was held that there was no evidence of payment, the debtor having no right to require the creditor either to sign any other than his true name or to be at the trouble of returning the order (*Gordon* v. *Strange* (1847), 1 Exch. 477).

(*d*) *Smith* v. *Ferrand* (1827), 7 B. & C. 19; *Sayer* v. *Wagstaff* (1844), 5 Beav. 415; *Sibree* v. *Tripp* (1846), 15 M. & W. 23; *Caine* v. *Coulton* (1863), 1 H. & C. 764.

(*e*) *Owenson* v. *Morse* (1796), 7 Term Rep. 64; *Sayer* v. *Wagstaff, supra; Belshaw* v. *Bush, supra; Gunn* v. *Bolckow, Vaughan & Co.* (1875), 10 Ch. App. 491; *Currie* v. *Misa* (1875), L. R. 10 Exch. 153, Ex. Ch.; *Re Matthew, Ex parte Matthew* (1884), 12 Q. B. D. 506; *Elwell* v. *Jackson* (1885), 1 T. L. R. 454, C. A.; *Re Romer and Haslam*, [1893] 2 Q. B. 286, C. A. Where bills were given to a solicitor for the amount of his bill of costs, and he gave a receipt "in settlement," it was held that, some of the bills having been dishonoured, the onus was on the solicitor of showing that they were taken in satisfaction of the debt, in order to preclude the client from taxing the bill of costs (*Re Romer and Haslam*, [1893] 2 Q. B. 286, C. A.; *Re Harries* (1844), 13 M. & W. 3). A conditional payment does not affect a lien of the creditor for the debt, unless it is shown that he took the instrument with the intention of waiving the lien (*Re London, Birmingham and South Staffordshire Bank* (1865), 34 L. J. (CH.) 418).

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is a conditional payment only (*f*). If the security is paid when it becomes due, this is equivalent to payment of the original debt (*g*); and if it is paid in part, the original debt is discharged *pro tanto* (*h*). If the instrument is dishonoured, payment of the original debt may be enforced as if no security had been taken (*i*), unless the bill has been negotiated and is outstanding at the time of action brought in the hands of a third party, in which case the creditor's remedy continues to be suspended (*k*).

Where the debtor is primarily liable on a bill, note or cheque which is given by way of conditional payment, it lies on him to prove any circumstance which he wishes to rely upon as excusing him from payment (*l*); but where he is only secondarily liable on it, the creditor must take whatever steps are necessary to obtain payment, and to preserve his remedy against the other parties, by giving due notice of dishonour or otherwise, and if by reason of his neglect to do so the debtor's position is prejudiced, the debtor is discharged from liability both on the instrument and in respect of the original debt (*m*). It is not necessary that notice of dishonour should be given to the debtor unless he is a party to the instrument (*n*), or there are special circumstances rendering the notice of dishonour necessary in the particular case (*a*).

(*f*) *Taylor* v. *Briggs* (1827), Mood. & M. 28; *Tapley* v. *Martens* (1800), 8 Term Rep. 451; *Maxwell* v. *Deare* (1853), 8 Moo. P. C. C. 363; *Price* v. *Price* (1847), 16 M. & W. 232; *Re London, Birmingham and South Staffordshire Bank* (1865), 34 L. J. (CH.) 418.

(*g*) *Felix Hadley & Co.* v. *Hadley*, [1898] 2 Ch. 680. Payment of the instrument will be presumed, in an action for recovery of the debt, until the contrary is proved (*Hebden* v. *Hartsink* (1801), 4 Esp. 46; *Mercer* v. *Cheese* (1842), 4 Man. & G. 804.

(*h*) *Bottomley* v. *Nuttall* (1858), 5 C. B. (N. S.) 122.

(*i*) *Sayer* v. *Wagstaff* (1844), 5 Beav. 415; *Cohen* v. *Hale* (1878), 3 Q. B. D. 371. Where a creditor holds a debtor's acceptance for the price of goods sold and the debtor commits an act of bankruptcy, the creditor is entitled to treat the bill as dishonoured (*Re Raatz, Ex parte Raatz*, [1897] 2 Q. B. 80).

(*k*) *Bunney* v. *Poyntz* (1833), 4 B. & Ad. 568; *Price* v. *Price* (1847), 16 M. & W. 232; *National Savings Bank Association* v. *Tranah* (1867), L. R. 2 C. P. 556; *Davis* v. *Reilly*, [1898] 1 Q. B. 1; *Re a Debtor, Ex parte the Debtor*, [1908] 1 K. B. 344, C. A. The creditor is not precluded from suing for the original debt if the dishonoured instrument is outstanding in the hands of a third person as trustee (*National Savings Bank Association* v. *Tranah*, *supra*), or agent for him (*Hadwen* v. *Mendizabel* (1825), 10 Moore (C. P.), 477), or if, although it may have been transferred to a third person, it is again in the hands of the creditor at the time when the action is brought (*Burden* v. *Halton* (1828), 4 Bing. 454; *Tarleton* v. *Allhusen* (1834), 2 Ad. & El. 32).

(*l*) *Price* v. *Price* (1847), 16 M. & W. 232; *National Savings Bank Association* v. *Tranah*, *supra*.

(*m*) *Bridges* v. *Berry* (1810), 3 Taunt. 130; *Soward* v. *Palmer* (1818), 8 Taunt. 277; *Camidge* v. *Allenby* (1827), 6 B. & C. 373; *Robson* v. *Oliver* (1847), 10 Q. B. 704. This is the case even if the bill was taken by way of collateral security only (*Peacock* v. *Pursell* (1863), 14 C. B. (N. S.) 728). As to the duty of the creditor where the debtor is not a party to the bill, see *Goodwin* v. *Coates* (1832), 1 Mood. & R. 221; *Smith* v. *Mercer* (1867), L. R. 3 Exch. 51; *Hopkins* v. *Ware* (1869), L. R. 4 Exch. 268. The debtor is also discharged if the bill is altered by the creditor in such a manner that the debtor's rights on it are affected (*Alderson* v. *Langdale* (1832), 3 B. & Ad. 660). And see p. 424, *ante*.

(*n*) *Swinyard* v. *Bowes* (1816), 5 M. & S. 62.

(*a*) *Smith* v. *Mercer*, *supra*.

Where a cheque or other instrument payable on demand is taken by way of conditional payment, it is the duty of the creditor to present it within a reasonable time, and if the debtor is prejudiced by reason of his failure to do so, he is discharged from liability (*b*).

Loss of instrument.

915. If a bill, note, or cheque taken as conditional payment is lost by the creditor, he may, on giving an indemnity, require the drawer to give him another instrument of the same tenor and obtain an order that the loss of the instrument is not to be set up in an action thereon (*c*).

Payment by post.

916. The posting of a cheque or other instrument, or of money, which is lost before it reaches the creditor does not amount to payment (*d*), unless the creditor requested the debtor to pay in that manner, in which case he will be taken to run the risk of its being lost (*e*).

Forged instrument.

917. If a document is given in payment which purports to be a bill, note, or cheque, but turns out to be a forgery or to be invalid for want of a stamp or otherwise, the creditor is entitled to enforce payment of the debt as if no such instrument had been taken by him (*f*).

(3) *Appropriation of Payments.*

Appropriation of payments.

918. Where several distinct debts are owing by a debtor to his creditor, the debtor has the right when he makes a payment to appropriate the money to any of the debts that he pleases, and the creditor is bound if he takes the money to apply it in the manner directed by the debtor. If the debtor does not make any appropriation at the time when he makes the payment, the right of appropriation devolves on the creditor (*g*).

An appropriation by the debtor need not be made in express terms; it may be inferred where the nature of the transaction or

(*b*) *Camidge* v. *Allenby* (1827), 6 B. & C. 373. And see *Chamberlyn* v. *Delarive* (1767), 2 Wils. 353.

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 69, 70; see title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 530.

(*d*) *Luttges* v. *Sherwood* (1895), 11 T. L. R. 233; *Pennington* v. *Crossley & Son* (1897), 77 L. T. 43, C. A.; *Baker* v. *Lipton* (1899), 15 T. L. R. 435.

(*e*) *Norman* v. *Ricketts* (1886), 3 T. L. R. 182, C. A.; *Warwicke* v. *Noakes* (1791), Peake, 98; and see *Edmundson* v. *Longton Corporation* (1902), 19 T. L. R. 15 (money put in automatic slot gas meter stolen without negligence, held a valid payment as being the mode of payment contemplated by the contract). In *Pennington* v. *Crossley & Son*, *supra*, the defendants had been for many years in the habit of purchasing goods from the plaintiff, and paying for them, without objection, by means of cheques through the post, and it was held that there was nothing from which a request by the plaintiff for payment in that manner could be inferred so as to throw the loss of a cheque during transmission on him.

(*f*) *Brown* v. *Watts* (1808), 1 Taunt. 353; *Cundy* v. *Marriott* (1831), 1 B. & Ad. 696; *Smart* v. *Nokes* (1844), 6 Man. & G. 911; *Bell* v. *Buckley* (1856), 11 Exch. 631; *Wilson* v. *Vysar* (1812), 4 Taunt. 288; *Wilson* v. *Kennedy* (1794), 1 Esp. 245; *Ruff* v. *Webb* (1794), 1 Esp. 129.

(*g*) *Peters* v. *Anderson* (1814), 5 Taunt. 596; *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 572, at p. 608; *Simson* v. *Ingham* (1823), 2 B. & C. 65; *Croft* v. *Lumley* (1857), 6 H. L. Cas. 672; *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca," The "Mecca,"* [1897] A. C. 286.

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the circumstances of the case are such as to show that there was an intention to appropriate (*h*).

Account current.

919. The right of appropriation by the creditor does not arise in the case of an account current, that is to say, where there is one entire account into which all receipts and payments are carried in order of date, so that all sums paid in form one blended fund (*i*). In such a case the presumption is that the first item on the debit side of the account is intended to be discharged or reduced by the first item on the credit side, and that the various items are appropriated in the order in which the receipts and payments are set against each other in the account (*k*).

This presumption, however, may be rebutted by evidence of an agreement to the contrary or of circumstances from which a contrary intention is to be inferred (*l*); and it has no application where the moneys paid to the account are in part the payer's own money and in part moneys held by him as a trustee (*m*). In such a case the sums on the debit side are applied in reduction of his own moneys whenever they may have been paid in (*m*). As between two or more beneficiaries under different trusts, however, the ordinary rule applies, where the moneys belonging to the trustee personally are not sufficient to satisfy the sums drawn out (*n*).

Time for appropriation.

920. Where the right of appropriation devolves upon the creditor, he is not bound to make his election at once. The right of appropriation may be exercised by him at any time up to the very last moment (*o*), that is, until he has finally exercised the right or

(*h*) *Newmarch* v. *Clay* (1811), 14 East, 239; *Marryatts* v. *White* (1817), 2 Stark. 101; *Shaw* v. *Picton* (1825), 4 B. & C. 715; *Bardwell* v. *Lydall* (1831), 7 Bing. 489; *Raikes* v. *Todd* (1838), 8 Ad. & El. 846; *Young* v. *English* (1843), 7 Beav. 10; *Burn* v. *Boulton* (1846), 2 C. B. 476; *Nash* v. *Hodgson* (1855), 6 De G. M. & G. 474; *Gee* v. *Pack* (1863), 33 L. J. (Q. B.) 49; *Browning* v. *Baldwin* (1879), 40 L. T. 248; *Lowther* v. *Heaver* (1889), 41 Ch. D. 248, C. A.

(*i*) *Field* v. *Carr* (1828), 5 Bing. 13; *Bodenham* v. *Purchas* (1818), 2 B. & Ald. 39; *Hooper* v. *Keay* (1875), 1 Q. B. D. 178.

(*k*) *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 572, at p. 608; *Bodenham* v. *Purchas* (1818), 2 B. & Ald. 39; *Brooke* v. *Enderby* (1820), 2 Brod. & Bing. 70; *Simson* v. *Ingham* (1823), 2 B. & C. 65; *Williams* v. *Rawlinson* (1825), 3 Bing. 71; *Sterndale* v. *Hankinson* (1827), 1 Sim. 393; *Field* v. *Carr* (1828), 5 Bing. 13; *Copland* v. *Toulmin* (1840), 7 Cl. & Fin. 349, H. L.; *Geake* v. *Jackson* (1867), 36 L. J. (C. P.) 108; *Re Devonport and South Devon Steam Flour Mill Co., Captain Bateman's Case* (1873), 42 L. J. (CH.) 577; *Hooper* v. *Keay* (1875), 1 Q. B. D. 178; *London and County Banking Co.* v. *Ratcliffe* (1881), 6 App. Cas. 722; *Re Stenning, Wood* v. *Stenning*, [1895] 2 Ch. 433; *Egg* v. *Craig* (1903), 89 L. T. 41.

(*l*) *Henniker* v. *Wigg* (1843), 4 Q. B. 792; *City Discount Co.* v. *McLean* (1874), L. R. 9 C. P. 692, Ex. Ch.; *Browning* v. *Baldwin* (1879), 40 L. T. 248; *Re Hallett's Estate, Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696, C. A., at p. 726; *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca," The "Mecca,"* [1897] A. C. 286.

(*m*) *Re Hallett's Estate, Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696 C. A.; *Spartali* v. *Crédit Lyonnais* (1885), 2 T. L. R. 178, C. A.; *Re Wreford, Carmichael* v. *Rudkin* (1897), 13 T. L. R. 153; and see title TRUSTS AND TRUSTEES.

(*n*) *Re Stenning, Wood* v. *Stenning*, [1895] 2 Ch. 433; and see *Mutton* v. *Peat*, [1899] 2 Ch. 556; *Favene* v. *Bennett* (1809), 11 East, 36.

(*o*) In *Seymour* v. *Pickett*, [1905] 1 K. B. 715, C. A., it was held that the creditor was entitled to exercise his right of appropriation in the course of the

something has happened which would render it inequitable for him to exercise it (*p*).

The election need not be made in express terms; it may be declared by bringing an action or in any other way that shows the creditor's intention (*q*). If the creditor makes an appropriation and communicates it to the debtor, or otherwise indicates that he has made his election, he is irrevocably bound by his decision, and cannot afterwards vary the appropriation (*r*). But entries made by the creditor in his books are not binding on him as showing that he has made his election unless they have been communicated by him to the debtor (*s*).

Mode of appropriation.

A creditor can appropriate a payment to a debt which is barred by the Statute of Limitations, or which is unenforceable because of some formal defect in the contract upon which it arises (*t*), but not to a debt which is illegal or to a claim which does not constitute a legal or equitable demand (*u*). Where a creditor makes an appropriation in part payment of a debt barred by the Statute of Limitations, such part payment does not operate as an acknowledgment by the debtor, so as to defeat the operation of the statute with regard to the unpaid portion of the debt (*v*).

To what debts.

921. Where a creditor has agreed to accept a composition payable by instalments in discharge of several debts, an instalment paid under the agreement is to be taken as a payment made in respect of all the debts rateably, even though the whole of the composition is not paid and the creditor is restored to his full rights (*x*).

Composition.

922. Where one of the debts is guaranteed by a surety and another is not, the mere fact of suretyship does not deprive the debtor or the creditor of the power of appropriation (*y*), and the

Guaranteed debt.

trial of an action, there having been no proceeding in the action amounting to an exercise of the right.

(*p*) *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca," The "Mecca,"* [1897] A. C. 286; *Smith* v. *Betty*, [1903] 2 K. B. 317, C. A.; *Seymour* v. *Pickett*, [1905] 1 K. B. 715, C. A.

(*q*) *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca," The "Mecca," supra.*

(*r*) *Smith* v. *Betty, supra; Friend* v. *Young*, [1897] 2 Ch. 421.

(*s*) *Simson* v. *Ingham* (1823), 2 B. & C. 65; *Hooper* v. *Keay* (1875), 1 Q. B. D. 178; *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca," The "Mecca," supra.*

(*t*) *Bosanquet* v. *Wray* (1816), 6 Taunt. 597; *Cruickshanks* v. *Rose* (1831), 1 Mood. & R. 100; *Mills* v. *Fowkes* (1839), 5 Bing. (N. C.) 455; *Seymour* v. *Pickett, supra* (unqualified dentist held entitled to appropriate payment towards charges which he was not legally entitled to enforce owing to his not being qualified); *Arnold* v. *Poole Corporation* (1842), 4 Man. & G. 860 (appropriation to fees of a solicitor which were not recoverable for want of a retainer under seal). But a payment cannot be appropriated to a statute-barred debt after an action has been brought and judgment given directing an account to be taken of the amount due, excluding the statute-barred items (*Smith* v. *Betty, supra*).

(*u*) *Wright* v. *Laing* (1824), 3 B. & C. 165; *Lamprell* v. *Billericay Union* (1849), 3 Exch. 283; *Keeping* v. *Broom* (1895), 11 T. L. R. 595.

(*v*) *Friend* v. *Young, supra.*

(*x*) *Thompson* v. *Hudson* (1871), 6 Ch. App. 320.

(*y*) *Kirby* v. *Marlborough (Duke)* (1813), 2 M. & S. 18; *Williams* v. *Rawlinson*

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surety has no right to insist on the appropriation of any payment to the guaranteed debt unless the circumstances of the case are such as to show that this was intended (*z*).

(4) *Receipt Stamps.*

Stamp duty on receipts.

923. Subject to certain exemptions (*a*), every receipt given for, or upon payment of, money amounting to two pounds or upwards is

(1825), 3 Bing. 71; *Re Sherry, London and County Banking Co.* v. *Terry* (1884), 25 Ch. D. 692, C. A.

(*z*) *Pearl* v. *Deacon* (1857), 1 De G. & J. 461, C. A.; *Kinnaird* v. *Webster* (1878), 10 Ch. D. 139; *Plomer* v. *Long* (1816), 1 Stark. 153; *Re Sherry, London and County Banking Co.* v. *Terry, supra.* In *Wright* v. *Hickling* (1866), L. R. 2 C. P. 199, it was held that a surety who had guaranteed payment of a promissory note given by a member to a loan club was not entitled to have the subscription of the debtor applied in reduction of his liability. As to the right of the surety to the benefit of a composition paid by the debtor in respect of all his debts, see *Bardwell* v. *Lydall* (1831), 7 Bing. 489; *Raikes* v. *Todd* (1838), 8 Ad. & El. 846; and *Gee* v. *Pack* (1863), 33 L. J. (Q. B.) 49.

(*a*) The following are the exemptions, allowed by the Stamp Act, 1891 (54 & 55 Vict. c. 39), Schedule, as amended by s. 9 of the Finance Act, 1895 (58 Vict. c. 16), and s. 8 of the Revenue Act, 1898 (61 & 62 Vict. c. 46):—

(1) Receipt given for money deposited with a banker, to be accounted for and expressed to be received of the person to whom it is to be accounted for.

(2) Acknowledgment by a banker of the receipt of any bill of exchange or promissory note for presentment for acceptance or payment.

(3) Receipt given for or upon payment of any parliamentary taxes or duties, or of money to or for the use of His Majesty.

(4) Receipt given by an officer of a public department for money paid by way of imprest or advance, or in adjustment of an account, where he derives no personal benefit therefrom.

(5) Receipt given by any agent for money imprested to him on account of the pay of the army.

(6) Receipt given by any officer, seaman, marine or soldier, or his representatives, for or on account of any wages, pay, or pension.

(7) Receipt given for any principal or interest due on an Exchequer bill.

(8) Receipt by a banker written in the ordinary course of his business on a bill of exchange or promissory note duly stamped, or the name of the payee of a draft or order payable to order.

(9) Receipt given upon any bill or note of the Bank of England or Bank of Ireland.

(10) Receipt for the consideration money for the purchase of any share in government or parliamentary stocks or funds, or in the stocks or funds of the Secretary of State in Council of India, or of the Bank of England or Bank of Ireland, or for any dividend on any such stocks or funds.

(11) Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned. This exemption extends to receipts for instalments payable under any duly stamped instrument (*London and Westminster Bank* v. *Inland Revenue Commissioners*, [1900] 1 Q. B. 166, C. A. (receipt on scrip certificate for instalments payable thereon)); and to an indorsement by the trustees on a trust deed for securing debenture stock that all principal and interest had been paid off and satisfied (*Firth & Sons, Ltd.* v. *Inland Revenue Commissioners*, [1904] 2 K. B. 205).

(12) Receipt for any allowance by way of drawback or otherwise upon the exportation of any goods or merchandise from the United Kingdom.

(13) Receipt for the return of any duty of customs upon a certificate of over entry.

(14) Receipt by an officer of a county court for money received from a party to any proceeding in the court.

(15) Receipt by or on behalf of a clerk to justices or a magistrate for money received in respect of a fine.

charged with a duty of one penny, which may be denoted by an adhesive stamp, to be cancelled by the person by whom the receipt is given before he delivers it out of his hands (*b*).

For the purposes of the stamp duty the expression "receipt" includes any note, memorandum, or writing whereby any money, or any bill of exchange or promissory note for money, amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied or discharged, or which signifies or imports any such acknowledgment, and whether it is signed with the name of any person or not (*c*).

Stamping after execution.

924. An unstamped receipt may be stamped with an impressed stamp within fourteen days after it has been given on payment of the duty and a penalty of five pounds, and between fourteen days and one month after it has been given on payment of the duty and a penalty of ten pounds; but it may not in any other case be stamped with an impressed stamp (*d*).

Penalty.

925. Any person who gives a receipt liable to duty not duly stamped, or in any case where a receipt would be liable to duty refuses to give a receipt duly stamped, or upon a payment to the amount of two pounds or upwards gives a receipt not amounting to two pounds or separates or divides the amount paid with intent to evade the duty, incurs a penalty of ten pounds (*e*).

Unstamped receipt as evidence.

926. A receipt chargeable with duty which is not duly stamped is not, except in criminal proceedings, admissible in evidence or available for any purpose whatever; provided that if it is produced in evidence within the time during which it may be stamped with an impressed stamp, it may, on payment of the amount of duty, and the penalty payable on stamping it, and of a further sum of

(*b*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 101 (2), and Schedule. The person giving the receipt must cancel the stamp by writing on or across it his name or initials, together with the true date of his so writing, or otherwise effectively cancel it and render it incapable of being used again, otherwise the receipt is not deemed duly stamped unless it is proved that the stamp thereon was affixed before he delivered it out of his hands (*ibid.*, s. 8 (1)), compare *M'Mullen* v. "*Sir Alfred Hickman*" *Steamship Co.* (1902), 71 L. J. (CH.) 766. If he neglects or refuses to duly and effectually cancel the stamp he is liable to a fine of five pounds (*ibid.*, s. 8 (3)).

(*c*) *Ibid.*, s. 101 (1). It is not necessary that the money should be paid in pursuance of a legal obligation (*General Council of the Bar* (*England*) v. *Inland Revenue Commissioners*, [1907] 1 K. B. 462, where it was held that counsels' signatures acknowledging the payment of fees must be stamped as receipts). In *A.-G.* v. *Carlton Bank*, [1899] 2 Q. B. 158, where a solicitor, who was employed by a bank at a fixed salary to recover debts due to the bank, paid over moneys received by him to a cashier, who initialled entries of the amounts so paid in a book kept for the purpose, it was held that the entries were receipts subject to stamp duty. But a mere acknowledgment of the correctness of an account does not require a receipt stamp (*Wellard* v. *Moss* (1823), 1 Bing. 134).

(*d*) *Ibid.*, s. 102.

(*e*) *Ibid.*, s. 103.

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one pound, be received in evidence, subject to any objection on other grounds (*a*).

SUB-SECT. 3.—*Release.*

Release.

927. A debt or the right of action which arises from a breach of contract may be discharged by a release under seal, but a parol release or waiver without valuable consideration amounts to a mere expression of intention not to insist upon the right, and is no bar to an action either at law or in equity (*b*). An exception to this rule exists in the case of bills of exchange and promissory notes, the holder of which may renounce his rights against the acceptor or any other party. Such renunciation must be in writing, unless the bill is delivered up to the acceptor, with the intention of discharging his liability, but no consideration is required to make it effective (*c*). In the case of an arrangement by a debtor with his creditors, by which each creditor agrees to accept a composition, the agreement by each creditor to forego part of his claim is sufficient consideration for the similar agreements by the others, and the debtor is effectively discharged without any release under seal (*d*).

Bills and notes.

A parol release for which the creditor receives consideration amounts to an accord and satisfaction (*e*).

Construction of release.

928. General words of release will be construed with reference to the surrounding circumstances and as being controlled by recitals and context so as to give effect to the object and purpose of the document (*f*). A release will not be construed as applying to facts

(*a*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14. In *Birchall* v. *Bullough*, [1896] 1 Q. B. 325, it was held that an unstamped promissory note, although not admissible in evidence, might be handed to a witness in civil proceedings to challenge his memory. See also *Jacob* v. *Lindsay* (1801), 1 East, 460, and *Maugham* v. *Hubbard* (1828), 8 B. & C. 14, where it was held, under former Stamp Acts, that an unstamped receipt might be used by a witness to refresh his memory.

(*b*) *Stackhouse* v. *Barnston* (1805), 10 Ves. 453, at p. 466; *Lodge* v. *Dicas* (1820), 3 B. & Ald. 611; *Tufnell* v. *Constable* (1836), 8 Sim. 69 (indorsement on a bond to the effect that the obligee forgave the obligor a portion of the debt); *Harris* v. *Goodwyn* (1841), 2 Man. & G. 405; *Cross* v. *Sprigg* (1849), 6 Hare, 552; *Peace* v. *Hains* (1853), 11 Hare, 151; *De Bussche* v. *Alt* (1878), 8 Ch. D. 286, C. A.; *Re Hancock, Hancock* v. *Berrey* (1888), 57 L. J. (CH.) 793; *Foster* v. *Dawber* (1851), 6 Exch. 839; *Jorden* v. *Money* (1854), 5 H. L. Cas. 185; *Cupit* v. *Jackson* (1824), 13 Price, 721, Ex. Ch. In *Byrn* v. *Godfrey* (1798), 4 Ves. 6, it was held that a declaration by a testator to his executor that he did not mean to call for payment of a promissory note held by him, did not preclude the executor, even in equity, from enforcing payment. The plaintiff's conduct, however, may be such as to estop him from asserting the continuance of the liability (*Yeomans* v. *Williams* (1865), L. R. 1 Eq. 184). If the release is under seal, no consideration is necessary (*Preston* v. *Christmas* (1759), 2 Wils. 86); and a debt of record may be discharged by a release under seal (*Barker* v. *St. Quintin* (1844), 12 M. & W. 441). As to discharge by cancellation or alteration, see p. 424, *ante*.

(*c*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 62, 89; *Foster* v. *Dawber* (1851), 6 Exch. 839. See title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 551.

(*d*) *Norman* v. *Thompson* (1850), 4 Exch. 755. Such an agreement is, perhaps, more properly considered as an accord and satisfaction than a release (see p. 443, *ante*).

(*e*) *Ford* v. *Beech* (1848), 11 Q. B. 852, Ex. Ch.; *Taylor* v. *Manners* (1865), 1 Ch. App. 48. See p. 441, *ante*.

(*f*) *Payler* v. *Homersham* (1815), 4 M. & S. 423; *Turner* v. *Turner* (1880),

of which the creditor had no knowledge at the time when it was given (*g*). A covenant not to sue, if unlimited as to time and unconditional, will be construed as a release (*h*); but a mere covenant not to sue for a limited time is not equivalent to a release (*i*); and a covenant not to sue a particular debtor who is liable jointly or jointly and severally with others will not operate to discharge the others (*k*). An instrument in the form of a release may be construed as a covenant not to sue in order to give effect to the intention of the parties as appearing from the context and surrounding circumstances (*l*).

Covenant not to sue.

929. Where several debtors are bound jointly or jointly and severally, a release given to one of them discharges the others (*m*), unless the creditor, when granting the release, reserved his rights against them. In that case the release is merely equivalent to a covenant not to sue one of the debtors and does not discharge the others (*n*). Where one joint debtor is released by a deed which

Joint and several debtors.

14 Ch. D. 829; *Ramsden* v. *Hylton*, *Hylton* v. *Biscoe* (1751), 2 Ves. Sen. 305; *Lampon* v. *Corke* (1822), 5 B. & Ald. 606; *Boyes* v. *Bluck* (1853), 13 C. B. 652; *Bisset* v. *Burgess* (1856), 23 Beav. 278; *Simons* v. *Johnson* (1832), 3 B. & Ad. 175; *Lindo* v. *Lindo* (1839), 1 Beav. 496; *Re Perkins*, *Poyser* v. *Beyfus* [1898] 2 Ch. 182, C. A. As to the construction of particular words, such as a release of all "debts," "actions," "contracts," "claims and demands," see Co. Litt. 291 b; *Hoe's Case* (1592), 5 Co. Rep. 70 b; *Hancock* v. *Field* (1607), Cro. Jac. 170; *Altham's Case* (1610), 8 Co. Rep. 150 b; *Tynan* v. *Bridges* (1612), Cro. Jac. 300; *Witton* v. *Bye* (1618), Cro. Jac. 486; *Haselgrove* v. *House* (1865), L. R. 1 Q. B. 101; *Tetley* v. *Wanless* (1867), L. R. 2 Exch. 275, Ex. Ch. See also titles BANKRUPTCY AND INSOLVENCY, Vol. II., p. 1; DEEDS AND OTHER INSTRUMENTS; EXECUTORS AND ADMINISTRATORS; TRUSTS AND TRUSTEES. For examples of a conditional release, see *Gibbons* v. *Vouillon* (1849), 8 C. B. 483; *Newington* v. *Levy* (1870), L. R. 6 C. P. 180, Ex. Ch.; *Hall* v. *Levy* (1875), L. R. 10 C. P. 154.

(*g*) *Lyall* v. *Edwards* (1861), 6 H. & N. 337; *Ecclesiastical Commissioners for England* v. *North Eastern Rail. Co.* (1877), 4 Ch. D. 845; *Re Armitage*, *Ex parte Good* (1877), 5 Ch. D. 46, C. A.; *Re Perkins*, *Poyser* v. *Beyfus* [1898] 2 Ch. 182, C. A.; *London and South Western Rail. Co.* v. *Blackmore* (1870), L. R. 4 H. L. 610; *Upton* v. *Upton* (1832), 1 Dowl. 400.

(*h*) *Ford* v. *Beech* (1848), 11 Q. B. 852, Ex. Ch.

(*i*) *Thimbleby* v. *Barron* (1838), 3 M. & W. 210; *Ford* v. *Beech*, *supra*; *Webb* v. *Spicer* (1849), 13 Q. B. 886; *Foley* (*Lady Emily*) v. *Fletcher* (1858), 3 H. & N. 769; *Morley* v. *Frear* (1830), 6 Bing. 547 (covenant by obligee of bond not to sue during the life of the obligor held no bar to an action by an assignee in the name of the obligee).

(*k*) *Hutton* v. *Eyre* (1815), 6 Taunt. 289.

(*l*) *Price* v. *Barker* (1855), 4 E. & B. 760; *Kearsley* v. *Cole* (1846), 16 M. & W. 128.

(*m*) *North* v. *Wakefield* (1849), 13 Q. B. 536; *Re Hodgson*, *Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, 188, C. A.; *Re Wolmershausen*, *Wolmershausen* v. *Wolmershausen* (1890), 62 L. T. 541; *Cheetham* v. *Ward* (1797), 1 Bos. & P. 630; *Nicholson* v. *Revill* (1836), 4 Ad. & El. 675; *Re E. W. A.*, [1901] 2 K. B. 642, C. A.

(*n*) *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas 755, P. C.; *Dean* v. *Newhall* (1799), 8 Term Rep. 168; *Hutton* v. *Eyre* (1815), 6 Taunt. 289; *Solly* v. *Forbes* (1820), 2 Brod. & Bing. 38; *North* v. *Wakefield* (1849), 13 Q. B. 536; *Price* v. *Barker* (1855), 4 E. & B. 760; *Willis* v. *De Castro* (1858), 4 C. B. (N. S.) 216; *Bateson* v. *Gosling* (1871), L. R. 7 C. P. 9; *Duck* v. *Mayeu*, [1892] 2 Q. B. 511, C. A.; *Rice* v. *Reed*, [1900] 1 Q. B. 54, C. A., *per* VAUGHAN WILLIAMS, L.J., at p. 67. See also the decisions as to the effect of an accord and satisfaction or payment by one of several joint debtors, pp. 444, 445, *ante*.

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does not reserve the right of the creditor against the others, parol evidence is not admissible to prove a promise by the others to remain liable notwithstanding the release, because such evidence would contradict the written instrument (*o*).

Joint creditors.

930. A release given by one of several joint creditors discharges the debt as against all of them (*p*), and a partner has implied authority to release any debt due to the firm so as to bind his co-partners (*q*); but a debtor will not be allowed to set up a release obtained by him from one of several joint creditors in fraud of the others (*r*), nor will a merely nominal plaintiff be permitted to release the cause of action without the consent of the person beneficially interested (*s*).

A covenant by one of several joint creditors not to sue the debtor does not discharge the debt as against the other joint creditors (*t*).

Debtor appointed executor.

931. The appointment of a debtor as executor of his creditor operates in law as a release of the debt, because an executor cannot sue himself; and the effect is the same if the person appointed executor is a debtor jointly or jointly and severally with some other person (*u*), and although he does not prove the will (*v*). But in equity the debtor is bound to account for the debt as assets of the testator (*x*), unless he can show that the testator, down to the time of his death, intended to forgive the debt, in which case he is discharged in equity as well as at law (*y*). The appointment of a creditor as executor does not operate as a release, even at law, unless

As to the effect of a release granted to a principal debtor where the creditor reserves his rights against the surety, see title GUARANTEE.

(*o*) *Cocks* v. *Nash* (1832), 9 Bing. 341; *Harding* v. *Ambler* (1838), 3 M. & W. 279; *Brooks* v. *Stuart* (1839), 9 Ad. & El. 854.

(*p*) *Ruddock's Case* (1599), 6 Co. Rep. 25 a; *Arton* v. *Booth* (1820), 4 Moore (C. P.), 192; *Wallace* v. *Kelsall* (1840), 7 M. & W. 264; *Wild* v. *Williams* (1840), 6 M. & W. 490; *Jones* v. *Herbert* (1817), 7 Taunt. 421; *Wilkinson* v. *Lindo* (1840), 7 M. & W. 81. But see *Haddon* v. *Ayers* (1858), 1 E. & E. 118; *Palmer* v. *Sparshott* (1842), 4 Man. & G. 137, and *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537, explained in *Powell* v. *Brodhurst*, [1901] 2 Ch. 160. See also the decisions as to the effect of an accord and satisfaction with one of several joint creditors or payment to one of them, pp. 444, 445, *ante*.

(*q*) *Perry* v. *Jackson* (1792), 4 Term Rep. 516; *Hawkshaw* v. *Parkins* (1819), 2 Swan. 539; *Furnival* v. *Weston* (1822), 7 Moore (C. P.), 356. See also title PARTNERSHIP.

(*r*) *Innell* v. *Newman* (1821), 4 B. & Ald. 419; *Barker* v. *Richardson* (1827), 1 Y. & J. 362; *Wild* v. *Williams* (1840), 6 M. & W. 490; *Phillips* v. *Clagett* (1843), 11 M. & W. 84; *Rawstorne* v. *Gandell* (1846), 15 M. & W. 304; *Piercy* v. *Fynney* (1871), L. R. 12 Eq. 69; *Jones* v. *Herbert* (1817), 7 Taunt. 421; *Arton* v. *Booth*, *supra*; *Furnival* v. *Weston* (1822), 7 Moore (C. P.), 356. And see *Mountstephen* v. *Brooke* (1819), 1 Chit. 390.

(*s*) *Hickey* v. *Burt* (1816), 7 Taunt. 48; *Innell* v. *Newman* (1821), 4 B. & Ald. 419.

(*t*) *Walmesley* v. *Cooper* (1839), 11 Ad. & El. 216.

(*u*) *Cheetham* v. *Ward* (1797), 1 Bos. & P. 630; *Freakley* v. *Fox* (1829), 9 B. & C. 130. See title EXECUTORS AND ADMINISTRATORS. A grant of administration to a debtor of an intestate does not release the debt, even at law.

(*v*) *Re Applebee*, *Leveson* v. *Beales*, [1891] 3 Ch. 422.

(*x*) *Carey* v. *Goodinge* (1790), 3 Bro. C. C. 110.

(*y*) *Strong* v. *Bird* (1874), L. R. 18 Eq. 315; *Re Applebee*, *Leveson* v. *Beales*, *supra*.

he proves the will, and, if he proves the will, he is in equity entitled to retain his debt out of the assets in priority to other creditors (*z*).

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932. Where a member of a partnership is adjudged bankrupt, the court may authorise the trustee in bankruptcy to commence and prosecute any action in the names of the trustee and of the bankrupt's partner, and any release by such partner of the debt or demand to which the action relates is void (*a*). Bankrupt partner.

933. A release by an infant is void (*b*). Infant.

SUB-SECT. 4.—*Merger.*

934. Where a creditor takes from his debtor a security of a higher nature than that which he already possesses for his debt, for instance, if he takes a bond or a covenant or recovers judgment in respect of a simple contract debt, his remedies on the minor security or cause of action are merged by operation of law in the higher remedy and are extinguished (*c*). But a deed or a bond may be taken as a collateral security without affecting the original right of action if it appears that this was intended by the parties (*d*). Merger.

In order to have the effect of merging the lower remedy the higher security must be co-extensive with it, that is to say, it must be taken in respect of the same debt, and the transaction must take place between the same parties (*e*). No merger takes place where the securities are of equal degree (*f*).

(*z*) *Rawlinson* v. *Shaw* (1790), 3 Term Rep. 557. For a detailed treatment of this subject, see title EXECUTORS AND ADMINISTRATORS.

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 113. See title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 161.

(*b*) Co. Litt. 264 b; 2 Shep. Touch. 334, n. See title INFANTS AND CHILDREN.

(*c*) *Owen* v. *Homan* (1851), 3 Mac. & G. 378; *Price* v. *Moulton* (1851), 10 C. B. 561; *Rolfe* v. *Peterson* (1772), 2 Bro. Parl. Cas. 436; *Woodward* v. *Gyles* (1690), 2 Vern. 119; *Marker* v. *Kenrick* (1853), 13 C. B. 188. An acknowledgment of a debt by an instrument under seal may have the effect of converting it into a specialty debt, even though there is no express covenant to pay the debt, if it appears that the deed was intended to operate as a covenant (*Saltoun* v. *Houstoun* (1824), 1 Bing. 433; *Saunders* v. *Milsome* (1866), L. R. 2 Eq. 573; *Isaacson* v. *Harwood* (1868), 3 Ch. App. 225; *Jackson* v. *North Eastern Rail. Co.* (1877), 7 Ch. D. 573). Compare *Yates* v. *Aston* (1843), 4 Q. B. 182; *Courtney* v. *Taylor* (1843), 6 Man. & G. 851.

(*d*) *Twopenny* v. *Young* (1824), 3 B. & C. 208; *Yates* v. *Aston* (1843), 4 Q. B. 182; *Holmes* v. *Bell* (1841), 3 Man. & G. 213; *Commissioner of Stamps* v. *Hope*, [1891] A. C. 476, P. C.

(*e*) *White* v. *Cuyler* (1795), 6 Term Rep. 176 (deed of surety does not merge simple contract debt of principal debtor); *Holmes* v. *Bell* (1841), 3 Man. & G. 213; *Bell* v. *Banks* (1841), 3 Man. & G. 258; *Norfolk Rail. Co.* v. *M'Namara* (1849), 3 Exch. 628 (bond for fixed sum to secure an existing debt and such further sums as might become due); *Ansell* v. *Baker* (1850), 15 Q. B. 20 (mortgage by one of the makers of joint and several note, with covenant to pay it, does not discharge the other maker); *Mowatt* v. *Londesborough* (*Lord*) (1854), 4 E. & B. 1, Ex. Ch. (deed by way of security executed in favour of trustees for the creditor); *Sharpe* v. *Gibbs* (1864), 16 C. B. (N. S.) 527; *Boaler* v. *Mayor* (1865), 19 C. B. (N. S.) 76 (covenant in mortgage deed by principal debtor not a discharge of sureties who had given a promissory note); *Chetwynd* v. *Allen*, [1899] 1 Ch. 353.

(*f*) *Preston* v. *Perton* (1601), Cro. Eliz. 817; *Branthwait* v. *Cornwallis* (1627),

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Judgments.

935. When judgment has been recovered in a court of record the original cause of action is merged in the judgment—*transit in rem judicatam* (*g*); but the judgment, so long as it remains unsatisfied, does not extinguish any remedy except the particular cause of action in respect of which it was recovered, and the creditor is not precluded by it from enforcing any collateral security which he may have taken (*h*). A judgment in an action for a principal debt does not preclude the creditor from bringing a subsequent action for interest which had accrued due prior to the date of the judgment (*i*), nor conversely is a judgment in an action for interest only a bar to a subsequent action for the principal debt (*k*). A judgment in an action for a principal debt is, however, a bar to any claim for subsequent interest, otherwise than on the judgment (*l*). Where a judgment is afterwards reversed the original cause of action revives (*m*).

Foreign judgments.

A judgment of a foreign or colonial court does not operate as a merger of the original cause of action in this country (*n*); but if the foreign judgment has been satisfied the creditor will be considered to have elected to take it in discharge of the whole cause of action, and will be debarred from suing in this country upon the original cause of action, even if, owing to a difference between the laws of the two countries, the amount of the foreign judgment is less than he might have recovered if the action had been brought in this country in the first instance (*o*).

Cro. Car. 85 ; *Price* v. *Moulton* (1851), 10 C. B. 561, at p. 574 (bond or covenant for payment of rent); *Kidd* v. *Boone, Evans' Claim* (1871), 40 L. J. (CH.) 531 ; *Higgens's Case* (1605), 6 Co. Rep. 44 b ; and see *Chetwynd* v. *Allen*, [1899] 1 Ch. 353.

(*g*) *Bagot* (*Lord*) v. *Williams* (1824), 3 B. & C. 235 ; *Siddall* v. *Rawcliffe* (1833), 1 Cr. & M. 487 ; *King* v. *Hoare* (1844), 13 M. & W. 494 ; *Stewart* v. *Todd* (1846), 9 Q. B. 767, Ex. Ch.; *Re European Central Rail. Co., Ex parte Oriental Financial Corporation* (1876), 4 Ch. D. 33, C. A. ; *Re Sneyd, Ex parte Fewings* (1883), 25 Ch. D. 338, C. A. The original debt, however, is not extinguished for the purpose of proceedings in bankruptcy (*Re King and Beesley, Ex parte King and Beesley*, [1895] 1 Q. B. 189) ; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 42. As to the operation of a judgment by way of estoppel between the parties, see title JUDGMENTS AND ORDERS.

(*h*) *Seddon* v. *Tutop* (1796), 6 Term Rep. 607 ; *Drake* v. *Mitchell* (1803), 3 East, 251 (judgment on a bill of exchange of one of three joint covenantors no bar to an action on the covenant); *Florence* v. *Jenings* (1857), 2 C. B. (N. S.) 454 ; *Popple* v. *Sylvester* (1882), 22 Ch. D. 98 ; *Wegg Prosser* v. *Evans*, [1895] 1 Q. B. 108, C. A. (judgment against one of two joint guarantors on a cheque no bar to an action against both or either of them on the guarantee) ; *Economic Life Assurance Society* v. *Usborne*, [1902] A. C. 147.

(*i*) *Florence* v. *Jenings*, *supra*.

(*k*) *Morgan* v. *Rowlands* (1872), 41 L. J. (Q. B.) 187.

(*l*) *Re European Central Rail. Co., Ex parte Oriental Financial Corporation* (1876), 4 Ch. D. 33, C. A. ; *Re Sneyd, Ex parte Fewings* (1883), 25 Ch. D. 338, C. A.

(*m*) *Higgens's Case* (1605), 6 Co. Rep. 44 b. As to the effect of a judgment which is void as against creditors by reason of the provisions of s. 27 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), see *Vibart* v. *Coles* (1890), 24 Q. B. D. 364, C. A.

(*n*) *Smith* v. *Nicolls* (1839), 5 Bing. (N. C.) 208 ; *Bank of Australasia* v. *Harding* (1850), 9 C. B. 661 ; *Bank of Australasia* v. *Nias* (1851), 16 Q. B. 717.

(*o*) *Barber* v. *Lamb* (1860), 8 C. B. (N. S.) 95 ; *Taylor* v. *Hollard*, [1902] 1 K. B. 676. And see title CONFLICT OF LAWS, Vol. VI., p. 282.

936. As a general rule a judgment recovered against one or more of several joint debtors bars an action against the others, even if the creditor did not know of their existence at the time when the first action was brought, and even if the judgment has not been satisfied. The foundation of the rule is that joint debtors have the right to insist upon being sued together and the creditor has disabled himself from suing them in this way, for there is only one cause of action, and that has been merged in the judgment (*p*).

Judgment against a joint debtor.

The rule above stated has no application in cases where the liability of the debtors is several as well as joint (*q*).

The rule applies equally whether the joint debtors are sued together or in separate actions, and whether judgment is obtained by consent or otherwise (*r*). It also applies where one of the joint debtors is a married woman who contracted in respect of her separate estate (*s*).

The plaintiff cannot evade the rule by getting the judgment set aside with the consent of the debtor against whom it was obtained (*t*).

An unsatisfied judgment recovered against one joint contractor on a cheque given by him alone in payment of the joint debt does not bar an action against the other debtors on the original contract, because the cause of action is not the same in each case, and there is no merger (*a*).

Exceptions.

The following exceptions have been grafted upon the rule stated above by the provisions of statutes or statutory rules:—

Judgment in default of appearance.

(1) Where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and there are several defendants of whom one or more appear to the writ and another or others of them fail to appear, the plaintiff may enter final judgment against such as have not appeared, and may issue execution upon such judgment without prejudice to his right to proceed with the action against such as have appeared (*b*).

In default of defence.

(2) Where one or more of the defendants make default in delivering a defence, the plaintiff may, if his claim is for a debt or liquidated demand, enter final judgment against such defendants and issue execution upon the judgment, or, if his claim is for damages, enter interlocutory judgment against them without

(*p*) *King* v. *Hoare* (1844), 13 M. & W. 494; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504, at pp. 540, 542.

(*q*) *Blumfield's Case* (1596), 5 Co. Rep. 86 b; *Higgens's Case* (1605), 6 Co. Rep. 44 b; *Ayrey* v. *Davenport* (1807), 2 Bos. & P. (N. R.) 474; *Lechmere* v. *Fletcher* (1833), 1 Cr. & M. 623; *King* v. *Hoare*, *supra*; *Re Davison*, *Ex parte Chandler* (1884), 13 Q. B. D. 50; *Blyth* v. *Fladgate*, [1891] 1 Ch. 337.

(*r*) *McLeod* v. *Power*, [1898] 2 Ch. 295. The defence must be specially pleaded (*ibid.*).

(*s*) *Hoare* v. *Niblett*, [1891] 1 Q. B. 781. See title HUSBAND AND WIFE.

(*t*) *Hammond* v. *Schofield*, [1891] 1 Q. B. 453.

(*a*) *Wegg Prosser* v. *Evans*, [1895] 1 Q. B. 108, C. A.

(*b*) R. S. C., Ord. 13, r. 4; *Pim Brothers* v. *Coyle*, [1903] 2 I. R. 457. Where the claim is for damages, the plaintiff may sign interlocutory judgment against the defendants who have failed to appear and proceed with the action against the other defendants (R. S. C., Ord. 13, r. 6). See title PRACTICE AND PROCEDURE.

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prejudice to his right to proceed with his action against the other defendants (*c*).

Under Order 14.

(3) Where on an application for summary judgment under Order 14 one or more of the defendants obtain leave to defend the action and another or others do not, the plaintiff is entitled to enter final judgment against the latter, and to issue execution upon such judgment without prejudice to his right to proceed with his action against the former (*d*).

Absence beyond seas.

(4) Where one or more of the joint debtors were beyond the seas at the time when the cause of action accrued, the creditor is not barred from commencing and suing any action or suit against him or them after his or their return from beyond the seas by reason only that he has already recovered judgment against such of the joint debtors as were not beyond the seas at that time (*e*).

Estate of deceased partner.

(5) Partners are liable jointly for the debts of the firm, but the estate of a deceased partner is also severally liable in a due course of administration for such debts, subject to the prior payment of his separate debts (*f*). A creditor who has obtained judgment against the surviving partners is not precluded from making a claim against the estate of the deceased partner (*g*), and conversely if he proceeds first against the estate of the deceased partner he can afterwards sue the surviving partners to recover so much of his debt as has not been satisfied (*h*).

Alternative remedies.

937. Where a debt is incurred or contract made under such circumstances as to create an alternative liability at the election of the creditor, or of one of the parties to the contract, as in the case of a contract made by an agent in his own name, a judgment against either of the parties alternatively liable, although unsatisfied, operates as a merger, and is a bar to any action against the other, the plaintiff by suing one of the parties to judgment being conclusively deemed to have made his election (*i*). The exceptions above mentioned in relation to a judgment against one or more of several joint debtors have no application to the case of an alternative liability (*k*).

SUB-SECT. 5.—*Arbitration.*

Arbitration.

938. The parties to a contract may agree that any dispute arising out of it, including the question of liability as well as that

(*c*) R. S. C., Ord. 27, rr. 3, 5.

(*d*) R. S. C., Ord. 14, r. 5; *Weall* v. *James* (1893), 68 L. T. 515, C. A.; *Walton & Co.* v. *Topakyan, Kevorkian and Marler* (1905), 53 W. R. 657, C. A.

(*e*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 11.

(*f*) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 9. See title PARTNERSHIP.

(*g*) *Liverpool Borough Bank* v. *Walker* (1859), 4 De G. & J. 24; *Re Outram, Ex parte Ashworth and Outram* (1893), 63 L. J. (Q. B.) 308.

(*h*) *Re Hodgson, Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177, C. A.

(*i*) *Priestly* v. *Fernie* (1865), 3 H. & C. 977; *Cross & Co.* v. *Matthews and Wallace* (1904), 91 L. T. 500; *Morel, Brothers & Co., Ltd.* v. *Westmorland* (*Earl*), [1904] A. C. 11; *French* v. *Howie*, [1906] 2 K. B. 674, C. A. The two latter cases were cases of husband and wife. See, however, *Partington* v. *Hawthorne* (1888), 52 J. P. 807. On the subject of the discharge of a principal by an election to look exclusively to the agent generally, see title AGENCY, Vol. I., p. 209.

(*k*) *Morel, Brothers & Co., Ltd.* v. *Westmorland* (*Earl*), *supra*; *French* v. *Howie*, *supra*.

of the amount of damages, shall be referred to arbitration, and that the obtaining of an award shall be a condition precedent to the right to bring an action on the contract. Where such an agreement has been made, no right of action arises on the contract until the amount of the liability has been ascertained by arbitration (*l*).

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An award made in an arbitration, unless set aside, is final and binding on the parties and persons claiming under them with respect to all matters within the scope of the reference (*m*). Where the award changes the nature of the defendant's liability, for instance, where it fixes an amount to be paid by him in discharge of a claim for unliquidated damages, it is in itself a defence to an action brought on the claim; but if there was a debt due at the time of the reference, and the award merely ascertains the amount, the award is no defence to such an action without payment of the amount awarded (*n*).

Award.

SUB-SECT. 6.—*Set-off.*

939. Where a right of action has accrued for breach of contract, the parties may agree that there shall be set off against the creditor's claim the amount of a debt due from him to the debtor. This is equivalent to payment to the extent of the amount set off (*o*).

Set-off and counterclaim.

Where an action has been brought in respect of a breach of contract, the defendant may set off or set up by way of counterclaim against the plaintiff's claim any right or claim whether sounding in damages or not, and such set-off or counterclaim has the same effect as a cross-action so as to enable the court to pronounce a final judgment in the same action both on the original and on the cross claim (*p*).

SUB-SECT. 7.—*Statutes of Limitation.*

940. A right of action for breach of contract, if not exercised within a certain time, is barred by the Statutes of Limitation, but the liability of the debtor may be renewed at any time by a written acknowledgment of the debt or by part payment of it, the effect of which is to take the case out of the operation of the statutes (*q*).

Statutes of Limitation.

SUB-SECT. 8.—*Death of a Party.*

941. The death of any of the parties to a contract does not as a general rule affect any right of action that has accrued for breach of

Death of a party.

(*l*) *Scott* v. *Avery* (1856), 5 H. L. Cas. 811; *Trainor* v. *Phœnix Fire Assurance Co.* (1892), 65 L. T. 825. See titles ACTION, Vol. I., p. 22; ARBITRATION, Vol. I., p. 445.

(*m*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 2, Sched. I.; *Martin* v. *Boulanger* (1883), 8 App. Cas. 296, P. C.; *Hutcheson* v. *Eaton* (1884), 13 Q. B. D. 861, C. A. (award no bar as to matters beyond the scope of the reference), discussed and followed in *Re North Western Rubber Co., Ltd. and Hüttenbach & Co.*, [1908] 2 K. B. 907, C. A., at p. 912.

(*n*) *Allen* v. *Milner* (1831), 2 Cr. & J. 47; *Parkes* v. *Smith* (1850), 15 Q. B. 297; *Commings* v. *Heard* (1869), L. R. 4 Q. B. 669.

(*o*) See p. 444, *ante*.

(*p*) R. S. C., Ord. 19, r. 3. As to set-off in general, see title SET-OFF AND COUNTERCLAIM.

(*q*) For a full treatment of this subject, see title LIMITATION OF ACTIONS.

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the contract, and such right of action survives to or against their personal representatives. The maxim *Actio personalis moritur cum persona* has no application to an action founded on contract (*r*), and, in cases where the same facts constitute both a breach of contract and a tort, the executor is not precluded from recovering damages to the personal estate arising from the breach of contract by reason of the fact that an action of tort might have been brought during the life of the testator in respect of personal injury resulting from the same act (*s*).

Where, however, the claim, though in form an action for breach of contract, is in reality an action arising out of a personal injury, as in the case of an action for breach of promise of marriage where no special damage to the property of the promisee is alleged, the cause of action terminates with the death of either of the parties, and does not survive to or against the personal representatives (*t*).

Personal contracts

Contracts of a purely personal nature, such as contracts for personal services, are discharged by the death of either of the parties (*u*), but a vested right of action for money actually earned under such a contract before the death of one of the parties survives to his personal representatives (*w*).

SUB-SECT. 9.—*Bankruptcy.*

Bankruptcy.

942. After a receiving order has been made in bankruptcy against one of the parties to a contract he can no longer be sued in respect of a breach of the contract committed before the date of the order except with the leave of the court. The creditor's only remedy is to prove for the debt or liability in the bankruptcy (*x*). An order of discharge releases the bankrupt from all debts provable in bankruptcy, with certain exceptions, but does not release any person who was jointly bound or had made any joint contract with him (*y*).

The property of a debtor, including his rights of action on contracts, is vested in the trustee in his bankruptcy from the date of the order of adjudication (*z*), and all property acquired by the

(*r*) *Wheatley* v. *Lane* (1669), 1 Wms. Saund. 239; *Ricketts* v. *Weaver* (1844), 12 M. & W. 718; *Twycross* v. *Grant* (1878), 4 C. P. D. 40, C. A.; *Phillips* v. *Homfray* (1883), 24 Ch. D. 439, C. A.; *Peebles* v. *Oswaldtwistle Urban District Council*, [1896] 2 Q. B. 159, C. A. As to the application of the maxim above quoted, see title EXECUTORS AND ADMINISTRATORS.

(*s*) *Knights* v. *Quarles* (1820), 2 Brod. & Bing. 102; *Bradshaw* v. *Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 C. P. 189; *Leggott* v. *Great Northern Rail. Co.* (1876), 1 Q. B. D. 599; *Batthyany* v. *Walford* (1887), 36 Ch. D. 269, C. A.

(*t*) *Chamberlain* v. *Williamson* (1814), 2 M. & S. 408; *Finlay* v. *Chirney* (1888), 20 Q. B. D. 494, C. A. See also *James* v. *Morgan*, [1909] 1 K. B. 564, and title HUSBAND AND WIFE.

(*u*) See p. 431, *ante*. But see *Wilson* v. *Harper*, [1908] 2 Ch. 370, where it was held that the death of a person, to whom a firm had agreed to pay commission on accounts of persons introduced by him "so long as we do business with them," did not terminate the liability, which continued in favour of his executors so long as the firm did business with the persons so introduced.

(*w*) *Stubbs* v. *Holywell Rail. Co.* (1867), L. R. 2 Exch. 311. See title MASTER AND SERVANT.

(*x*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 9, 37; and see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 60. As to the effect of the winding-up of a company on contracts made with the company, see title COMPANIES, Vol. V.

(*y*) *Ibid.*, s. 30 (2), (3).

(*z*) *Ibid.*, ss. 20, 54, 168.

bankrupt before his discharge is divisible among his creditors (*a*). The trustee, therefore, is in general the proper person to enforce a right of action vested in the debtor, but in the case of a contract for personal services entered into by a bankrupt, if a right of action accrues during the bankruptcy the debtor is entitled to sue for breach of the contract, subject to the right of the trustee to intervene and claim the proceeds (*b*).

SECT. 4. Discharge of Right of Action for Breach of Contract.

SUB-SECT. 10.—*Contracts with an Alien Enemy.*

943. The effect of an outbreak of war upon a contract that has been previously made with a subject of a hostile State is that if the contract is executory it is avoided, and both parties are released from performance (*c*); if, however, the contract was executed at the time when the war began, its validity is not affected, but the remedy upon it is suspended during the continuance of the war and revives when peace is restored (*d*).

Outbreak of war.

Part VI.—Constructive Contracts.

SECT. 1.—*In General.*

944. Contracts, as we have seen, may be either express or implied (*e*), and of the latter there are two broad divisions, the term "implied contract" in English law being applied not only to contracts which are inferred from the conduct or presumed intention of the parties, of which examples have already been given (*f*), but also to obligations imposed by implication of law, quite apart from and without regard to the probable intention of the parties, and sometimes even in opposition to their expressed or presumed intention (*g*). Strictly speaking, the latter class, or constructive contracts, as they are sometimes called, are not true contracts at all, since the element of consent (*h*) is absent, but by a fiction of law,

Contracts implied by law.

(*a*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44.

(*b*) *Jameson* v. *Brick and Stone Co.* (1878), 4 Q. B. D. 208, C. A.; *Bailey* v. *Thurston & Co., Ltd.*, [1903] 1 K. B. 137, C. A. For a full treatment of this subject, see title BANKRUPTCY AND INSOLVENCY, Vol. II., pp. 138, 167.

(*c*) See p. 432, *ante*.

(*d*) *Ex parte Boussmaker* (1806), 13 Ves. 71; *Alcenius* v. *Nygren* (1854), 1 Jur. (N. S.) 16; *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484; see title ALIENS, Vol. I., at p. 310.

(*e*) See pp. 345 *et seq.*, *ante*.

(*f*) *E.g.*, see note (*t*), p. 348, *ante*.

(*g*) *E.g.*, where a husband has unjustifiably turned away or deserted his wife and a tradesman supplies her with necessaries, he is entitled to sue the husband for the price on an implied contract, notwithstanding that he may have received express instructions from the husband not to give credit to the wife (*Wilson* v. *Glossop* (1888), 20 Q. B. D. 354, C. A.; *Hunt* v. *De Blaquière* (1829), 5 Bing. 550); and see *Bradshaw* v. *Beard* (1862), 12 C. B. (N. S.) 344, and title HUSBAND AND WIFE.

(*h*) See p. 354, *ante*.

SECT. 1. In General.

invented for the purposes of pleading, they are regarded as contracts, and will be treated here as such.

Services etc. obtained by fraud or wrong.

945. It is an axiom of the law that no person will be permitted to take advantage of his own fraud or wrong (*i*); and although no promise of remuneration is implied in law from the mere fact that services are performed for another and the benefit accepted by him (*k*), such a promise is implied where one person by fraud induces another to perform a service without intending to pay for it; and the obligation so created may be enforced in the same way as if it were an obligation arising out of an express contract (*l*). For example, if a person travels by railway without a ticket, intending to avoid payment of his fare (*m*), or carries luggage with an excursion ticket issued on condition that no luggage shall be taken (*n*), or takes merchandise as personal luggage (*o*), he can be sued on an implied contract for the amount of the fare or for the carriage of the luggage, as the case may be. On the same principle, a person who fraudulently induces another to sell goods to a third person whom he knows to be insolvent is liable on an implied contract to pay the price (*a*), and a person who clandestinely abstracts gas which has not passed through the meter may be sued on an implied contract to pay the price of the gas (*b*).

The obligations created by the application of the principles of general average and salvage (*c*) are important instances of the kind of contracts under consideration, and others may be conveniently arranged and treated of under the following headings (*d*).

(*i*) *Hill* v. *Perrott* (1810), 3 Taunt. 274.

(*k*) *Reeve* v. *Reeve* (1858), 1 F. & F. 280; *Foord* v. *Morley* (1859), 1 F. & F. 496; *Taylor* v. *Brewer* (1813), 1 M. & S. 290; *Hulse* v. *Hulse* (1856), 17 C. B. 711; *Russel* v. *M'Clymont* (1906), 8 F. (Ct. of Sess.) 821.

(*l*) *Rumsey* v. *North Eastern Rail. Co.* (1863), 14 C. B. (N. S.) 641; *Lightly* v. *Clouston* (1808), 1 Taunt. 112 (A. having wrongfully induced B.'s apprentice to work for him, held that B. might sue for the value of the services in an action for work and labour); *Foster* v. *Stewart* (1814), 3 M. & S. 191 (similar case).

(*m*) *London and Brighton Rail. Co.* v. *Watson* (1879), 4 C. P. D. 118, C. A. But he cannot be sued on an implied contract to pay a sum in the nature of a penalty under a bye-law, as in the case of a bye-law providing that a passenger travelling without a ticket should pay the fare from the place from which the train commenced the journey (*ibid*).

(*n*) *Rumsey* v. *North Eastern Rail. Co.*, *supra*.

(*o*) *Britten* v. *Great Northern Rail. Co.*, [1899] 1 Q. B. 243.

(*a*) *Hill* v. *Perrott*, *supra*. And see *Abbotts* v. *Barry* (1820), 2 Brod. & Bing. 369, where the defendant, who had fraudulently conspired with an insolvent to obtain goods from the plaintiff and received the proceeds in satisfaction of a debt due to him from the insolvent, was held liable to pay over the proceeds. For further illustrations of the principle, see pp. 471 *et seq.*, *post*.

(*b*) *Birmingham and Staffordshire Gas Co.* v. *Ratcliffe* (1871), 40 L. J. (EX.) 136.

(*c*) As to which, see titles ADMIRALTY, Vol. I., p. 73; SHIPPING AND NAVIGATION. The principle of salvage is confined to maritime law. There is no general right to salvage known to our law (*Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, C. A., at pp. 239, 248).

(*d*) Sects. 2 to 7, *post*.

SECT. 2.—*Money paid.*

Payment by request.

946. Where a payment is made at the request of another, a promise to repay the amount will be implied, even though the person at whose request the payment was made has not thereby been relieved from any legal claim (*e*).

Payment of another's debt.

947. Where one person has been compelled to pay the debt or discharge the liability of another, the law will, as a general rule, imply a contract on the part of such other person to indemnify him, as though the payment had been made at the request of the other, and he who has been compelled to pay may recover the amount of the payment under the title of money paid to the other's use (*f*).

Indemnity of surety.

948. The most common example of a compulsory payment to the use of another occurs where a surety, or a person in a position analogous to that of a surety, is called upon to pay a sum of money on the default of the principal debtor or other person primarily liable. He may recover in this form of action the money so paid, by reason of the implied contract of indemnity (*g*). Thus, a person becoming bail for another may recover from that other any sum which he has been compelled to pay through his default (*h*); the drawer or indorser of a bill who has been compelled to pay the holder may sue the acceptor; and the acceptor of an accommodation bill is entitled to be indemnified by the person accommodated (*i*).

(*e*) It is immaterial in such a case whether the payment discharges a debt due to a stranger or is a loan or gift to him (*per* POLLOCK, C.B., in *Brittain* v. *Lloyd* (1845), 14 M. & W. 762, at p. 773).

(*f*) *Johnson* v. *Royal Mail Steam Packet Co.* (1867), L. R. 3 C. P. 38; *Gebhardt* v. *Saunders*, [1892] 2 Q. B. 452; *Andrew* v. *St. Olave's Board of Works*, [1898] 1 Q. B. 775; *The Heather Bell*, [1901] P. 143, *per* JEUNE, P., at p. 155. Though the person compelled to pay usually stands in some kind of relationship to the person for whom he pays, no relationship or privity is necessary to give a right of action (*per* LINDLEY, L.J., in *Edmunds* v. *Wallingford* (1885), 14 Q. B. D. 811, C. A., at p. 815; and see *per* WILLES, J., in *Roberts* v. *Crowe* (1872), L. R. 7 C. P. 629). See also *Griffenhoofe* v. *Daubrez* (1855), 5 E. & B. 746; *The Orchis* (1890), 15 P. D. 38; *England* v. *Marsden* (1866), L. R. 1 C. P. 529, which was questioned in *Edmunds* v. *Wallingford*, *supra*.

For cases in which a person in the course of his employment is compelled to discharge a liability for which his employer is primarily liable, see title AGENCY, Vol. I., p. 196.

(*g*) *Hales* v. *Freeman* (1819), 4 Moore (C. P.), 21; *Bate* v. *Payne* (1849), 13 Q. B. 900; compare *Foster* v. *Ley* (1835), 2 Bing. (N. C.) 269. For persons in a position analogous to that of a surety, see *Longchamp* v. *Kenny* (1779), 1 Doug. (K. B.) 137, and *Brown* v. *Hodgson* (1811), 4 Taunt. 189. In the latter case a carrier by mistake delivered goods to B. instead of to C.; being compelled to pay their value to C., he was held entitled to recover from B. The implied contract of indemnity may be ousted by an express agreement between the parties, or by the taking of security; see *Toussaint* v. *Martinnant* (1787), 2 Term Rep. 100.

(*h*) His indemnity extends to all expenses to which he is put by reason of having given bail (*Fisher* v. *Fallows* (1804), 5 Esp. 171; *Emery* v. *Clark* (1857), 2 C. B. (N. S.) 582; see also *Jones* v. *Orchard* (1855), 16 C. B. 614).

(*i*) *Pownal* v. *Ferrand* (1827), 6 B. & C. 439; *Asprey* v. *Levy* (1847), 16 M. & W. 851; *Reynolds* v. *Doyle* (1840), 2 Scott (N. R.), 45; *Driver* v. *Burton* (1852), 17 Q. B. 989; *Bleaden* v. *Charles* (1831), 5 Moo. & P. 14; see also the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 28, and title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., pp. 520 *et seq.*

SECT. 2. **Money paid.**

So, where a partner accepts a bill in the name of the firm for a debt due from him personally, and the other partner is compelled to pay the bill, the latter may recover the amount from the former as money paid to his use (*j*).

Assignment of lease.

On the same principle a tenant who has assigned his lease, and is afterwards compelled to execute repairs under his covenant with the lessor, may recover the cost from the assignee, such assignee being primarily liable (*k*).

Taxes paid by tenant.

949. There is another class of cases closely similar, in which the defendant, though not primarily liable as regards third persons, is required by statute to discharge a liability which would otherwise fall on the plaintiff, and by reason of his default the plaintiff has been compelled to pay. Thus, where a landlord is required to bear the burden of taxes which are payable in the first instance by the tenant, and fails to do so, the tenant may (unless he is restricted to making a deduction from his rent (*l*)) recover the amount of such payment as he has been compelled to make, under an implied contract with his landlord, and as having been money paid to his use (*m*); but where the statute itself provides the tenant's remedy, as in the case of the landlord's income tax, by allowing him to deduct the tax or other expense from the rent, that, as a general rule, is his only remedy, and a tenant who omits to make the deduction cannot treat his payment as having been made to his landlord's use (*n*).

Liability undertaken by agreement.

950. Or again, the defendant, instead of having the liability imposed upon him by statute, may have taken upon himself by agreement with the plaintiff the duty of discharging a liability which would otherwise fall on the plaintiff, and if, by reason of his breach of such agreement, the plaintiff has been compelled to pay, he may recover the amount as money paid to the defendant's use (*o*).

(*j*) *Cross* v. *Cheshire* (1851), 7 Exch. 43.

(*k*) *Moule* v. *Garrett* (1872), L. R. 7 Exch. 101, Ex. Ch. See also *Johns* v. *Pink*, [1900] 1 Ch. 296; *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society*, [1899] 1 Q. B. 161, C. A.

(*l*) As, for example, under the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), repealed by the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 215.

(*m*) *Earle* v. *Maugham* (1863), 14 C. B. (N. S.) 626; *Dawson* v. *Linton* (1822), 5 B. & Ald. 521; *Baker* v. *Greenhill* (1842), 3 Q. B. 148.

(*n*) His payment will be treated either as a voluntary payment and not recoverable (*Denby* v. *Moore* (1817), 1 B. & Ald. 123; and see *post*, p. 477), or else as a payment of rent in advance and not recoverable as money paid to the use of the landlord until the whole of the rent has been paid in full (*Cumming* v. *Bedborough* (1846), 15 M. & W. 438, *per* ALDERSON, B., at p. 443; *Stubbs* v. *Parson* (1820), 3 B. & Ald. 516, *per* BAYLEY, J., at p. 520). The law on this point is perhaps not free from doubt; see Robinson on Income Tax, 2nd ed., pp. 148, 274.

(*o*) He may, of course, also claim damages for breach of the agreement. Such an agreement may even be implied, either by custom (*Grissell* v. *Robinson* (1836), 3 Scott, 329; see also *Wilkinson* v. *Grant* (1856), 18 C. B. 319) or on the special facts of the case (*Hawley* v. *Beverley* (1843), 6 Scott (N. R.), 837; *Stone* v. *Evans* (1797), Peake, Add. Cas. 94). Contrast, however, with *Grissell* v. *Robinson*, *supra*, the earlier case of *Spencer* v. *Parry* (1835), 3 Ad. & El. 331, where it was held that this form of action would not lie against a tenant for the breach of an agreement to pay landlord's taxes. In *Bate* v. *Payne* (1849), 13 Q. B.

So, where a person in the course of his employment incurs a liability on the employer's behalf which he is compelled to discharge, he may recover any payment made thereunder from his employer (*p*).

Liability incurred in course of employment, or for costs

This rule applies to the case of a plaintiff who has incurred expense in defending an action on the defendant's behalf or at his express or implied request (*q*). But a plaintiff who has accepted an accommodation bill and been compelled to pay the costs of an action brought thereon cannot recover such costs from the person accommodated in this form of action (*r*) unless he was requested by him to undertake the defence (*s*).

Voluntary payment.

951. A voluntary (*t*) payment made by one person on behalf of another without his request is not recoverable under this form of action (*u*), however clearly the payment is for the defendant's benefit (*x*), and even though it may relieve him from a legal liability (*y*), or though followed by an express promise of reimbursement (*z*). But it has been said that where the person for whom a

900, an executor, being required to pay duty on profits accruing from and on the principal value of leaseholds which he had allowed the legatee to occupy for fifteen years, recovered the sum paid from the legatee.

(*p*) For illustrations see under title AGENCY, Vol. I., p. 145.

(*q*) *Howes* v. *Martin* (1794), 1 Esp. 161; *Williamson* v. *Henley* (1829), 6 Bing. 299; *Frixione* v. *Tagliaferro* (1856), 10 Moo. P. C. C. 175; *Re Wells and Croft, Ex parte Official Receiver* (1895), 72 L. T. 359; *Pettman* v. *Keble* (1850), 9 C. B. 701. So the costs of an action brought on another's behalf with his authority, express or implied, may be recovered from him in this form of action (*Bailey* v. *Macaulay* (1849), 13 Q. B. 815; *Curtis* v. *Barclay* (1826), 5 B. & C. 141).

(*r*) *Seaver* v. *Seaver* (1834), 6 C. & P. 673.

(*s*) *Garrard* v. *Cottrell* (1847), 10 Q. B. 679; *Gillett* v. *Rippon* (1829), Mood. & M. 406.

(*t*) The meaning of "voluntary" is the same as in the next section, "Money had and received"; some of the following cases are common to both sections.

(*u*) *Lampleigh* v. *Brathwait* (1615), Hob. 105, 1 Smith, L. C., 11th ed., 141; *Denby* v. *Moore* (1817), 1 B. & Ald. 123; *Wilson* v. *Ray* (1839), 10 Ad. & El. 82; *Bradshaw* v. *Bradshaw* (1841), 9 M. & W. 29; *Cartwright* v. *Rowley* (1799), 2 Esp. 723; *Re National Motor Mail-Coach Co., Ltd., Clinton's Claim*, [1908] 2 Ch. 515, C. A., at pp. 520, 523. A sheriff cannot recover money paid for keeping goods seized under a writ, without an express request (*Bilke* v. *Havelock* (1813), 3 Camp. 374).

(*x*) *Tappin* v. *Broster* (1823), 1 C. & P. 112; *Re Leslie, Leslie* v. *French* (1883), 23 Ch. D. 552; *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, C. A.; *Re Winchilsea's (Earl) Policy Trusts* (1888), 39 Ch. D. 168; *Fry* v. *Lane* (1888), 40 Ch. D. 312; *Atkins* v. *Banwell* (1802), 2 East, 505. See also *Victors* v. *Davies* (1844), 12 M. & W. 758.

(*y*) *Sleigh* v. *Sleigh* (1850), 5 Exch. 514; *Johnson* v. *Royal Mail Steam Packet Co.* (1867), L. R. 3 C. P. 38, *per* WILLES, J., at p. 43. The defendant may be liable, however, for a payment which is not voluntary, even though he may not thereby be relieved (see p. 465, *ante*).

(*z*) *Eastwood* v. *Kenyon* (1840), 11 Ad. & El. 438; *Re National Motor Mail-Coach Co., Ltd., Clinton's Claim, supra*, overruling on one point *Re English and Colonial Produce Co., Ltd.*, [1906] 2 Ch. 435, C. A. An apparent exception to the rule that voluntary payments cannot be recovered is found in the case of a stranger incurring expense in the burial of a woman separated from her husband. He may recover such expense from the husband, probably on the ground of public policy (*Ambrose* v. *Kerrison* (1851), 10 C. B. 776; see also *Bradshaw* v. *Beard* (1862), 12 C. B. (N. S.) 344). *A fortiori*, a plaintiff cannot recover money paid for the defendant against the defendant's will (*Stokes* v. *Lewis* (1785), 1 Term Rep. 20; *Warwick* v. *Slade* (1811), 3 Camp. 127; *Fisher* v. *Liverpool Insurance Co.*

SECT. 2. Money paid.

voluntary payment has been made has the option of either adopting or declining the benefit, and he elects to adopt it, he will become liable to repay the money so paid on his behalf (*a*).

"Compulsion."

952. The compulsion applied to make the plaintiff pay the defendant's debt need not, however, be a legal compulsion which admits of no alternative (*b*). Thus, an under-tenant paying his immediate lessor's rent under threat of distress or eviction by the head lessor pays under compulsion, and may recover the rent as money paid for his lessor's use (*c*), and a payment made on demand to a person in a position to dictate terms which there is no legal obligation to accept is deemed to be made under compulsion (*d*); if, however, the payment is made in pursuance of any such terms, but after the compulsion has been removed, the payment is no longer deemed to be compulsory and is not recoverable (*e*). So long as the compulsion exists, it is immaterial by what machinery it may be applied (*f*). It is not necessary, in order to render a payment compulsory, that the plaintiff should have waited till legal proceedings were actually taken against him (*g*); nor, on the other hand, is he disentitled to recover because time may have been given him for payment (*h*).

Goods distrained.

Another kind of compulsion which is not strictly legal compulsion occurs where a person incurs expense in order to recover his own goods which have been lawfully seized or detained for another's debt (*i*). The most common example is where one person's goods

(1874), L.R. 9 Q. B. 418, Ex. Ch.; *Home Marine Insurance Co.* v. *Smith*, [1898] 2 Q. B. 351, C. A.; *Bowlby* v. *Bell* (1846), 3 C. B. 284; *Howard* v. *Tucker* (1831), 1 B. & Ad. 712).

(*a*) *Leigh* v. *Dickeson* (1884), 15 Q. B. D. 60, C. A., *per* BRETT, M.R., at pp. 64, 65; *Barber* v. *Brown* (1857), 1 C. B. (N. S.) 121, 151; *Roberts* v. *Champion* (1826), 5 L. J. (O. S.) (K. B.) 44.

(*b*) There may be "practical" without "actual legal" compulsion (see upon this point *North* v. *Walthamstow Urban District Council* (1898), 62 J. P. 836; but see also *Ellis* v. *Bromley Rural District Council* (1899), 81 L. T. 224).

(*c*) *Murphy* v. *Davey* (1884), 14 L. R. Ir. 28; *Jones* v. *Morris* (1849), 3 Exch. 742. See, after July 1, 1909, Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), and title DISTRESS.

(*d*) *Atkinson* v. *Denby* (1862), 7 H. & N. 934, Ex. Ch., in which case defendant refused to agree to a composition unless plaintiff paid him £50: plaintiff held entitled to recover; *Smith* v. *Cuff* (1817), 6 M. & S. 160, where plaintiff on entering into a composition scheme agreed to give preferential payment by way of bills to the defendant, and was subsequently compelled to pay such bills to third persons as holders for value; *Horton* v. *Riley* (1843), 11 M. & W. 492; *Smith* v. *Bromley* (1760), 2 Doug. (K. B.) 696, n.

(*e*) *Wilson* v. *Ray* (1839), 10 Ad. & El. 82.

(*f*) *Cross* v. *Cheshire* (1851), 7 Exch. 43. In this case B., being in partnership with A., gave a promissory note in the partnership name, for his private debt. A., having been compelled to pay on the note, was held entitled to recover against B.

(*g*) *Maydew* v. *Forrester* (1814), 5 Taunt. 615; *Hutton* v. *Eyre* (1815), 6 Taunt. 289; *Cordron* v. *Masserene* (*Lord*) (1792), Peake, 194; *Hales* v. *Freeman* (1819), 4 Moore (C. P.), 21, *per* BURROUGH, J., at p. 32. But payment without legal obligation, as by the drawer of an accommodation bill who has received no notice of dishonour to the holder, is voluntary and not recoverable (*Sleigh* v. *Sleigh* (1850), 5 Exch. 514).

(*h*) *Carter* v. *Carter* (1829), 5 Bing. 406.

(*i*) *Edmunds* v. *Wallingford* (1885), 14 Q. B. D. 811, C. A.; *The Orchis* (1890), 15 P. D. 38, C. A. In the former case A.'s goods were seized under a judgment against B. in circumstances which estopped A. from setting up his

have been lawfully distrained for rent due to another person's landlord. The owner of the goods may in such a case redeem them and recover the expense from the person distrained upon (*k*). But no such right of indemnity will be implied where the goods are left on the premises distrained upon for the convenience of their owner (*l*), or where as between the owner of the goods and the tenant the owner is liable for the rent (*m*). *A fortiori*, a person who without request pays money to prevent distraint upon another person's goods cannot recover in respect of such payment (*n*).

Discharge of lien.

953. Analogous to the case of a plaintiff having redeemed his own goods distrained for the defendant's rent is that of a plaintiff having paid off a lien incurred by the defendant in order to obtain his own goods. He, too, may recover the sum so paid from the defendant (*o*).

Estoppel.

954. A plaintiff, though under no legal compulsion to pay money on the defendant's behalf, may have paid it under such circumstances that the defendant will not be allowed to dispute his authority. In this case, too, the plaintiff will be entitled to recover the amount so paid as having been paid for the defendant's use (*p*).

Payment must be of money.

955. In order to be entitled to recover in this form of action the plaintiff must have made an actual or virtual payment of money (*q*).

title against the creditor. A. was nevertheless entitled to be indemnified by B. In the latter case a claim *in rem* brought against a vessel was paid off by the mortgagees of the vessel, who were held entitled to be indemnified by the mortgagors. After July 1, 1909, the remedy of the owner of the goods will be to proceed under s. 1 of the Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53). See title DISTRESS.

(*k*) *Exall* v. *Partridge* (1799), 8 Term Rep. 308 ; and see *Edmunds* v. *Wallingford* (1885), 14 Q. B. D. 811, C. A. These two cases were considered in *Re Button, Ex parte Haviside*, [1907] 2 K. B. 180, C. A., at pp. 188, 190. Reference may also be made to *Taylor* v. *Zamira* (1816), 6 Taunt. 524. In *Sapsford* v. *Fletcher* (1792), 4 Term Rep. 511, an under-tenant paid his lessor's ground rent under threat of distress by the superior landlord, and was held entitled to deduct such payment from his own rent (see also *Graham* v. *Tate* (1813), 1 M. & S. 609; *Gregory* v. *Stanway* (1860), 2 F. & F. 309). If he does not redeem the goods he cannot recover their value in this form of action (*Moore* v. *Pyrke* (1809), 11 East, 52; and see p. 476, *post*, and compare *Rodgers* v. *Maw* (1846), 15 M. & W. 444).

(*l*) *Griffenhoofe* v. *Daubrez* (1855), 5 E. & B. 746, Ex. Ch. ; and it makes no difference that the tenant also may incidentally reap a benefit. In *England* v. *Marsden* (1866), L. R. 1 C. P. 529, the plaintiff had a bill of sale on defendant's goods, but after seizing them he allowed them for his own convenience to remain with the defendant, and subsequently paid defendant's rent to prevent such goods from being distrained. He was held not entitled to recover; but the decision was doubted in *Edmunds* v. *Wallingford* (1885), 14 Q. B. D. 811, C. A. As to the right of contribution where one of two persons who hold separate under-leases derived from one original lease has paid the whole rent under threat of distress by the original lessor, see p. 472, *post*.

(*m*) *Edmunds* v. *Wallingford*, *supra*.

(*n*) *Jones* v. *Simmons* (1881), 45 J. P. 666.

(*o*) But he must give the defendant an opportunity of disputing the amount of the lien (*Bevan* v. *Waters* (1828), 3 C. & P. 520 ; and see *Johnson* v. *Royal Mail Steam Packet Co.* (1867), 17 L. T. 445, case suggested by WILLES, J., at p. 450).

(*p*) *Alexander* v. *Vane* (1836), 1 M. & W. 511.

(*q*) See cases cited in following notes, and analogous cases under "Money had and received," p. 473, *post*.

SECT. 2. **Money paid.**

Neither the incurring of a liability (*r*) nor the loss of goods (*s*) can be treated as money paid.

And for use of defendant.

956. Further, for this form of action to lie, it is essential that the payment should have been strictly for the use of the defendant. Thus, where a plaintiff had bought stolen cows in open market and paid for their keep, and on conviction of the thief the cows had revested (*t*) in the defendant, it was held that the plaintiff could not recover the price of their keep as money paid to the defendant's use, because from the time when the plaintiff purchased them until conviction of the thief they were the plaintiff's own property (*a*).

Negligence etc. of plaintiff.

957. Where a person makes a payment in discharge of a liability incurred in consequence of his own negligence or breach of duty (*b*), or in respect of a transaction which he knows to be unlawful (*c*), or a gaming or wagering contract (*d*), no contract to indemnify him will be implied. But the illegality of a transaction in respect of which a payment is made will not disentitle the person making the payment to indemnity where the transaction is not illegal in itself, but only by reason of circumstances which are unknown to him (*e*).

(*r*) Thus, where one of the makers of a joint and several promissory note gave a bond to the holder when the note was due, but paid no money on the bond, it was held that he could not recover contribution against other makers of the promissory note (*Maxwell* v. *Jameson* (1818), 2 B. & Ald. 51); and see *Taylor* v. *Higgins* (1802), 3 East, 169; but see also *Barclay* v. *Gooch* (1797), 2 Esp. 571, where Lord KENYON held that a plaintiff giving a promissory note for the defendant's debt, which the defendant's creditor accepts in payment, may maintain an action against the defendant for money paid to his use. See this last and other cases discussed in *Fahey* v. *Frawley* (1890), 26 L. R. Ir. 78, at pp. 89, 90.

(*s*) Where a plaintiff's goods are distrained on the defendant's premises for rent due to the defendant's landlord and purchased by a stranger, the plaintiff cannot maintain an action for money paid to the use of the defendant, the money paid never having been the plaintiff's money (*Moore* v. *Pyrke* (1809), 11 East, 52); and payment by an agent is treated as payment by the principal, however principal and agent may ultimately settle their mutual accounts (*Adams* v. *Dansey* (1830), 6 Bing. 506). But where the plaintiff's goods are seized by a stranger under a writ of *fi. fa.* for a debt which (as between plaintiff and defendant) the defendant should have paid, the plaintiff may recover their value from the defendant as "money paid," because the levy of the sheriff has converted the plaintiff's goods into money (*Rodgers* v. *Maw* (1846), 15 M. & W. 444, distinguishing *Moore* v. *Pyrke*, *supra*, on this ground).

(*t*) By virtue of the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100.

(*a*) *Walker* v. *Matthews* (1881), 8 Q. B. D. 109; and see *Royal Mail Steam Packet Co.* v. *Acraman* (1848), 2 Exch. 569; *Thurnell* v. *Symonds* (1843), 1 Car. & Kir. 44. See analogous cases under "Money had and received," p. 473, *post*.

(*b*) *Pitcher* v. *Bailey* (1807), 8 East, 171; *Toplis* v. *Grane* (1839), 5 Bing. (N. C.) 636; *Simpson* v. *Swan* (1812), 3 Camp. 291; *Skyring* v. *Greenwood* (1825), 4 B. & C. 281; *Frixione* v. *Tagliaferro* (1856), 10 Moo. P. C. C. 175; *Davison* v. *Fernandes* (1889), 6 T. L. R. 73; *Lewis* v. *Samuel* (1846), 8 Q. B. 685; *Capp* v. *Topham* (1805), 6 East, 392.

(*c*) *Shackell* v. *Rosier* (1836), 2 Bing. (N. C.) 634; *Scott* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724, C. A.; *Josephs* v. *Pebrer* (1825), 3 B. & C. 639 (purchase of shares in illegal company); *Allkins* v. *Jupe* (1877), 2 C. P. D. 375 (premiums paid on illegal insurance); *Re Parker* (1882), 21 Ch. D. 408, C. A. (illegal payments at election); *Ex parte Mather* (1797), 3 Ves. 373 (purchase of contraband goods); *De Begnis* v. *Armistead* (1833), 10 Bing. 107; *Atkinson* v. *Denby* (1862), 7 H. & N. 934, Ex. Ch. And see p. 407, *ante*.

(*d*) Gaming Act, 1892 (55 Vict. c. 9). See title GAMING AND WAGERING.

(*e*) *Betts* v. *Gibbins* (1834), 2 Ad. & El. 57; *Adamson* v. *Jarvis* (1827), 4 Bing. 66; *Burrows* v. *Rhodes*, [1899] 1 Q. B. 816.

SECT. 3.—*Contribution.*

958. Where one of several persons jointly or jointly and severally liable under a contract is called upon to perform the contract in full, or to discharge more than his own proper share, he has, as a general rule, a right to call upon the persons jointly or jointly and severally liable with himself to contribute to the liability which he has incurred, and the payment which he has made will be treated as a payment to the use of all the co-debtors (*f*). Joint contractors.

The action for contribution is, therefore, merely an application of the implied contract of indemnity which arises where one person is compelled to pay the debt of another (*g*).

If one of several persons who were originally jointly liable has died and has agreed that his executors are to stand in his place as regards the contract, his executors will be likewise bound to contribute, the liability not being limited to the survivors of the joint contractors (*h*); and in the case of a joint and several liability, the executors are liable to contribute apart from any such express agreement (*h*). Liability of executors.

959. In estimating the amount of contribution to which a plaintiff is entitled the rule at law was that regard must be had to the number of persons originally liable, and not to the number actually liable and solvent at the time of payment (*i*); but the rule in equity was that regard must be had to the number remaining liable and solvent at the time of the payment (*j*), and the equity rule now prevails (*k*). The defendant is not liable in this form of action to any contribution until the amount actually due from him has been ascertained (*l*), nor, as a general rule, can the plaintiff require other persons to contribute to the costs which he has been compelled to pay in the proceedings which established his liability (*m*); but where one of several co-defendants pays the whole of the plaintiff's costs which Amount of contribution.

(*f*) *Holmes* v. *Williamson* (1817), 6 M. & S. 158; *Burnell* v. *Minot* (1820), 4 Moore (C. P.), 340; *Edger* v. *Knapp* (1843), 6 Scott (N. R.), 707; *Spottiswoode's Case* (1855), 6 De G. M. & G. 345; *Marsack* v. *Webber* (1860), 6 H. & N. 1 (where two persons jointly employed an arbitrator and one paid the whole of his fees, he was entitled to recover one half from the other); *Boulter* v. *Peplow* (1850), 9 C. B. 493 (joint liability for rent); *Dimes* v. *Arden* (1836), 6 Nev. & M. (K. B.) 494 (for repair of a bridge); *Lowe* v. *Dixon* (1885), 16 Q. B. D. 455 (joint adventurers); *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; *Re Snowdon, Ex parte Snowdon* (1881), 17 Ch. D. 44, C. A.

(*g*) It does not depend on any express agreement between the parties, and in that sense there may be no privity between them (*Edmunds* v. *Wallingford* (1885), 14 Q. B. D. 811, C. A., *per* LINDLEY, L.J. at p. 815).

(*h*) *Prior* v. *Hembrow* (1841), 8 M. & W. 873.

(*i*) *Batard* v. *Hawes* (1853), 2 E. & B. 287.

(*j*) *Hitchman* v. *Stewart* (1855), 3 Drew. 271; *Lowe* v. *Dixon* (1885), 16 Q. B. D. 455; *Ramskill* v. *Edwards* (1885), 31 Ch. D. 100.

(*k*) By virtue of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25.

(*l*) *Sharpe* v. *Cummings* (1844), 2 Dow. & L. 504; *Bates* v. *Townley* (1848), 2 Exch. 152. See also *Wolmershausen* v. *Gullick*, *supra*.

(*m*) See and compare *Knight* v. *Hughes* (1828), 3 C. & P. 467; *Gillett* v. *Rippon* (1829), Mont. & M. 406; *Roach* v. *Thompson* (1830), Mont. & M. 487; *Blyth* v. *Smith* (1843), 5 Man. & G. 405; *Tindall* v. *Bell* (1843), 11 M. & W. 228; and *Pierce* v. *Williams* (1854), 23 L. J. (EX.) 322. Where, however, the plaintiff has defended the previous action at the request of such other persons, or there have been special circumstances justifying the defence, he may possibly be able to obtain contribution towards the costs he has been compelled to pay, see *The Millwall*, [1905] P. 155, *per* COZENS-HARDY, L.J., at p. 176, and title GUARANTEE.

SECT. 3. Contribution.

were ordered to be paid by the defendants, he can obtain contribution in respect thereof from the other co-defendants in the action (*n*).

Co-sureties

960. The right of contribution exists between co-sureties (*o*), even though one surety may be unaware of the existence of the other (*p*). The form of the agreement whereby they have agreed to become sureties is immaterial, the real nature of the agreement alone being taken into consideration (*q*). The right of contribution also, as a general rule, exists as between co-insurers of the same property, although they contracted independently of one another (*r*).

Partners.

961. Where partners are under a joint liability in respect of a particular transaction arising out of and connected with the partnership, and one of them is compelled to pay more than his share of such joint liability, the court will not enforce his right of contribution in respect thereof against his co-partners, because on taking a general partnership account it might be found that he was liable to repay the amount so recovered (*s*). This rule has, however, no application where two or more persons engage in a particular transaction which is distinct and separate from their partnership business; in such case the right of contribution will be enforced (*t*).

Tithes.

962. An action for contribution lies where an owner and occupier of a portion of property has been compelled to pay tithes in respect of the whole (*u*).

Common liability essential.

963. A common liability being the essence of the right of contribution, no such right exists in favour of one tenant in common of a house who has spent money on proper and reasonable repairs against his co-tenant (*x*), or of a churchwarden who has paid for the repair of a church against parishioners who have attended at a vestry to sign the order for repairs but without intending to become individually responsible (*y*). So, where a plaintiff and defendant

(*n*) *Newry Salt Works Co.* v. *Macdonnell*, [1903] 2 I. R. 454.

(*o*) *Whiting* v. *Burke* (1871), 6 Ch. App. 342; *Arcedeckne* v. *Howard* (*Lord*) (1875), 45 L. J. (CH.) 622, H. L.; Lord ELDON suggested in *Craythorne* v. *Swinburne* (1807), 14 Ves. 160, at p. 164, that a contract might be inferred between co-sureties by reason of their implied knowledge of the equitable principle of contribution; see *Cowell* v. *Edwards* (1800), 2 Bos. & P. 268; *Turner* v. *Davis* (1796), 2 Esp. 478; *Browne* v. *Lee* (1828), 6 B. & C. 689; *Deering* v. *Winchelsea* (1800), 2 Bos. & P. 270; *Kemp* v. *Finden* (1845), 12 M. & W. 421; *Davies* v. *Humphries* (1841), 6 M. & W. 168; and see title GUARANTEE.

(*p*) *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733, P. C. Compare *Re Denton's Estate, Licences Insurance Corporation and Guarantee Fund, Ltd.* v. *Denton*, [1904] 2 Ch. 178, C. A.; and see title GUARANTEE.

(*q*) Thus, the drawer of a bill who is compelled to pay the whole may claim contribution against the indorser where the real nature of the agreement between them is that both shall be sureties for the acceptor (*Reynolds* v. *Wheeler* (1861), 10 C. B. (N. S.) 561; *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733, P. C.).

(*r*) This is a principle of the law of insurance. See title INSURANCE for details.

(*s*) *Sedgwick* v. *Daniell* (1857), 2 H. & N. 319; and see *Saddler* v. *Nixon* (1835), 5 B. & Ad. 936; *Wilson* v. *Cutting* (1834), 10 Bing. 436; *French* v. *Styring* (1857), 2 C. B. (N. S.) 357.

(*t*) *Sedgwick* v. *Daniell*, *supra*; and see title PARTNERSHIP.

(*u*) *Christie* v. *Barker* (1884), 53 L. J. (Q. B.) 537, C. A.

(*x*) *Leigh* v. *Dickeson* (1884), 15 Q. B. D. 60, C. A. It is suggested, however, that where a duty to repair rests on the tenants in common, as in the case where the property owned by them has become a nuisance, the right of contribution may exist (see same case, *per* LINDLEY, L.J., at p. 68).

(*y*) *Lanchester* v. *Frewer* (1824), 2 Bing. 361; and see *Sprott* v. *Powell* (1826), 3 Bing. 478.

hold separate under-leases derived from one original lease, and the plaintiff has paid rent to the superior landlord under threat of distress upon the premises of both, he is not entitled to sue the defendant for his proportion of the rent so paid as money paid to his use (*z*).

Tortfeasors.

964. No right of contribution exists between joint tortfeasors (*a*), nor can a person who has been called on to pay a sum of money by reason of his own negligence require contribution in respect of such sum (*b*).

SECT. 4.—*Money had and received.*

Money had and received.

965. Where one person has received the money of another under such circumstances that he is regarded in law as having received it to the use of that other, the law implies a promise on his part to make payment to the person entitled thereto, and in default the rightful owner may maintain an action for money had and received to his use (*c*).

Subrogation.

966. A contract insuring property is a contract of indemnity only, and it is a principle of the law of insurance that an insurer who pays as for a total loss is entitled to be subrogated to all the rights of the assured in respect of the property. If, therefore, after receiving full indemnity, the assured recovers from any third person any sum, by way of damages or otherwise, in respect of the property, the insurer is entitled to recover such sum as money

(*z*) *Hunter* v. *Hunt* (1845), 1 C. B. 300; *Johnson* v. *Wild* (1890), 44 Ch. D. 146. In the former case the reason given was that the money was not shown to be paid for the defendant's use; in the latter case that there was no common liability upon both parties to pay. The real reason for the rule appears to be the practical inconvenience of allowing a right of action which in some cases might extend to an unknown number of persons and cause a multiplicity of suits (see judgments in each case).

(*a*) Therefore, if A. recovers in tort against B. and C., and levies the whole of the damage against B., B. cannot recover anything from C. (*Merryweather* v. *Nixan* (1799), 8 Term Rep. 186; 1 Smith, L. C., 11th ed., 398; see also *Adamson* v. *Jarvis* (1828), 4 Bing. 72; *Moxam* v. *Grant*, [1900] 1 Q. B. 88, and compare *Betts* v. *Gibbins* (1835), 2 Ad. & El. 57, and *Dixon* v. *Fawcus* (1860), 30 L. J. (Q. B.) 137). The principle underlying this decision is that no presumed contract to subscribe to the commission of a wrong will be enforced (*per* Lord HALSBURY in *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.*, [1894] A. C. 318, at p. 333). This rule is confined to cases where the person seeking redress was aware that he was committing an unlawful act (*Pearson* v. *Skelton* (1836), 1 M. & W. 504; see also *Wooley* v. *Batte* (1826), 2 C. & P. 417; *Farebrother* v. *Ansley* (1808), 1 Camp. 343; *Wilson* v. *Milner* (1810), 2 Camp. 452, *per* Lord ELLENBOROUGH). As to contribution between co-trustees in respect of liability for a breach of trust, see *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685, C. A.; *Robinson* v. *Harkin*, [1896] 2 Ch. 415; and title TRUSTS AND TRUSTEES; and as to contribution between co-directors in respect of misrepresentations in prospectuses, see Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 84 (4), and title COMPANIES, Vol. V. See also titles AGENCY, Vol. I., p. 145; MASTER AND SERVANT.

(*b*) *M'Ilreath* v. *Margetson* (1785), 4 Doug. (K. B.) 278. In that case A. and B. being jointly liable to pay a sum of money, A. negligently paid part thereof to persons not entitled and was held unable to make B. contribute thereto. For the special form of contribution known as general average, see title SHIPPING AND NAVIGATION.

(*c*) See *Re Bodega Co., Ltd.*, [1904] 1 Ch. 276; *Lodge* v. *National Union Investment Co., Ltd.*, [1907] 1 Ch. 300; and see also 1 Smith, L. C., 11th ed., 425.

SECT. 4. Money had and received.

received to his use (*d*). But this rule does not apply to a sum received by the assured by way of compensation for loss in excess of the amount paid by the insurer (*e*).

Privity of contract.

967. Without privity of contract the fact that the defendant is wrongfully in possession of money held for the benefit of the plaintiff (*f*), or even in possession of the plaintiff's own money (*g*), does not enable this form of action to be maintained. Thus, the action cannot be maintained by a client against the London agent of his country solicitor (*h*), by any creditor against a defendant who has received money as servant or agent of the debtor (*i*), by a *cestui que trust* against his trustee (*k*), by one tenant in common against his co-tenant who has received more than his share of profits (*l*), nor, generally speaking, by a principal against a sub-agent (*m*). Sufficient privity exists between the trustee of a bankrupt and a creditor of the bankrupt who has wrongfully obtained payment (*n*), between an execution creditor and sheriff who has retained more than the sum to which he is entitled (*o*), or who has wrongfully paid over the proceeds of an execution without notice of an act of bankruptcy upon an indemnity (*p*), or between a person whose goods have been wrongfully seized as those of an

(*d*) *Darrell* v. *Tibbitts* (1880), 5 Q. B. D. 560, C. A.; *Castellain* v. *Preston* (1883), 11 Q. B. D. 380, C. A.; *Dufourcet* v. *Bishop* (1886), 18 Q. B. D. 373; *West of England Fire Insurance Co.* v. *Isaacs*, [1897] 1 Q. B. 226, C. A.; *White* v. *Dobinson* (1844), 14 Sim. 273. And see title INSURANCE.

(*e*) *Burnand* v. *Rodocanachi* (1882), 7 App. Cas. 333.

(*f*) *Jones* v. *Carter* (1845), 8 Q. B. 134, at p. 138; *Colonial Bank* v. *Exchange Bank of Yarmouth, Nova Scotia* (1885), 11 App. Cas. 84, 90, P. C.; *Watson* v. *Russell* (1864), 5 B. & S. 968, Ex. Ch.

(*g*) *Bluck* v. *Siddaway* (1846), 15 L. J. (Q. B.) 359.

(*h*) *Cobb* v. *Becke* (1845), 6 Q. B. 930; *Robbins* v. *Fennell* (1847), 11 Q. B. 248; *Gray* v. *Kirby* (1834), 2 Dowl. 601. But in such case the court, in the exercise of its jurisdiction over its own officers, will see that justice is done between the parties (*Ex parte Edwards* (1881), 8 Q. B. D. 262, C. A.; *Hanley* v. *Cassan* (1847), 11 Jur. 1088).

(*i*) *Stephens* v. *Badcock* (1832), 3 B. & Ad. 354; *Baron* v. *Husband* (1833), 4 B. & Ad. 611; and *Howell* v. *Batt* (1833), 2 Nev. & M. (K. B.) 381 (expressly on the ground of want of privity). This rule does not apply where the agent is liable to be treated as a principal (*Parker* v. *Bristol and Exeter Rail. Co.* (1851), 6 Exch. 702). For the liability of a banker who has converted his customer's cheque, see title BANKERS AND BANKING, Vol. I., p. 567.

(*k*) *Edwards* v. *Lowndes* (1852), 1 E. & B. 81, 89. Unless the trustee admits holding money to be paid over (*Roper* v. *Holland* (1835), 3 Ad. & El. 99; *Bartlett* v. *Dimond* (1845), 14 M. & W. 49; *Pardoe* v. *Price* (1847), 16 M. & W., 451, at p. 459; *Remon* v. *Hayward* (1835), 2 Ad. & El. 666); and see p. 490, *post*.

(*l*) *Thomas* v. *Thomas* (1850), 5 Exch. 28.

(*m*) *New Zealand and Australian Land Co.* v. *Watson* (1881), 7 Q. B. D. 374, C. A.; *Schmaling* v. *Tomlinson* (1815), 6 Taunt. 147; *Lockwood* v. *Abdy* (1845), 14 Sim. 437; *Stephens* v. *Badcock* (1832), 3 B. & Ad. 354; *Montagu* v. *Forwood*, [1893] 2 Q. B. 350, C. A.; *Pinto* v. *Santos* (1814), 1 Marsh. 132; *Maw* v. *Pearson* (1860), 28 Beav. 196. And see title AGENCY, Vol. I., p. 171. Compare *De Bussche* v. *Alt* (1878), 8 Ch. D. 286, C. A.

(*n*) *Follett* v. *Hoppe* (1847), 5 C. B. 226.

(*o*) *Longdill* v. *Jones* (1816), 1 Stark. 345; *Dale* v. *Birch* (1813), 3 Camp. 346; *Swain* v. *Morland* (1819), 1 Brod. & Bing. 370; *Bower* v. *Hett*, [1895] 2 Q. B. 337, C. A. Privity exists between an execution creditor and an under-sheriff (*Gloucestershire Banking Co.* v. *Edwards* (1887), 19 Q. B. D. 575).

(*p*) *Young* v. *Marshall* (1831), 8 Bing. 43.

execution debtor and the sheriff (*q*), and even between an execution creditor and an under-sheriff (*r*).

Direct payment from the plaintiff to the defendant (*s*), or the delivery and acceptance of a bill of exchange (*t*), or an admission by the defendant that he holds money to be paid over to the plaintiff (*u*), also constitute sufficient privity of contract for the purpose of maintaining this form of action.

Money paid for use of another.

968. If A. gives money to B. which B. by mistake hands over to C., there is no privity to enable A. to sue C. in this form of action (*v*); but where A. hands money to B. for the express purpose that B. shall pay it to C., and B. enters into an engagement with C. so to pay him, then privity of contract is established, and the action lies against B., as having constituted himself C.'s agent (*w*). If B., however, repudiates the agency, the privity of contract is wanting, and the action will not lie (*x*); it is necessary that he should have undertaken to hold the money for the plaintiff (*a*).

Novation.

969. Analogous rules govern the assignment of a debt. The assignment does not create any privity of contract (*b*), but where the defendant is indebted to a third person who is himself indebted to the plaintiff, and all three parties agree that the defendant shall become the plaintiff's debtor, then privity of contract is created between them, and, provided that certain necessary conditions are complied with, this form of action is maintainable to enforce payment of the defendant's debt to the plaintiff (*c*).

(*q*) *Oughton* v. *Seppings* (1830), 1 B. & Ad. 241.

(*r*) *Gloucestershire Banking Co.* v. *Edwards* (1887), 19 Q. B. D. 575.

(*s*) *Colonial Bank* v. *Exchange Bank of Yarmouth, Nova Scotia* (1885), 11 App. Cas. 84, 90, P. C.

(*t*) *Hooper* v. *Treffry* (1847), 1 Exch. 17.

(*u*) *Roper* v. *Holland* (1835), 3 Ad. & El. 99, and other cases cited in note (*k*), p. 474, *ante*.

(*v*) Even though A. gave B. the money for a specific purpose (*Rogers* v. *Kelly* (1809), 2 Camp. 123).

(*w*) See *Lilly* v. *Hays* (1836), 5 Ad. & El. 548; *Hodgson* v. *Anderson* (1825), 3 B. & C. 842; *Crowfoot* v. *Gurney* (1832), 9 Bing. 372; *Robertson* v. *Fauntleroy* (1823), 8 Moore (C. P.), 10; *Hamilton* v. *Spottiswoode* (1849), 4 Exch. 200; *Noble* v. *National Discount Co.* (1860), 5 H. & N. 225; *Stevens* v. *Hill* (1805), 5 Esp. 247; *Langston* v. *Corney* (1815), 4 Camp. 176; *De Bernales* v. *Fuller* (1810), 14 East, 590, n., as explained in *Yates* v. *Bell* (1820), 3 B. & Ald. 643; *Baron* v. *Husband* (1833), 4 B. & Ad. 611. And the action lies though there may be no debt due from A. to C. (*Walker* v. *Rostron* (1842), 9 M. & W. 411; *Griffin* v. *Weatherby* (1868), L. R. 3 Q. B. 753).

(*x*) *Williams* v. *Everett* (1811), 14 East, 582; *Yates* v. *Bell*, *supra*; *Gibson* v. *Minet* (1824), 9 Moore (C. P.), 31; *Wharton* v. *Walker* (1825), 6 Dow. & Ry. (K. B.) 288; *Moore* v. *Bushell* (1857), 27 L. J. (EX.) 3; *Hill* v. *Royds* (1869), L. R. 8 Eq. 290; *Johnson* v. *Robarts* (1875), 10 Ch. App. 505.

(*a*) *Barlow* v. *Browne* (1846), 16 M. & W. 126; *Howell* v. *Batt* (1833), 2 Nev. & M. (K. B.) 381; *Morrell* v. *Wootten* (1852), 16 Beav. 197; *Malcolm* v. *Scott* (1850), 5 Exch. 601; *Bell* v. *London and North Western Rail. Co.* (1852), 15 Beav. 548; *Brind* v. *Hampshire* (1836), 1 M. & W. 365; *Scott* v. *Porcher* (1817), 3 Mer. 652; *Wedlake* v. *Hurley* (1830), 1 Cr. & J. 83; *Stewart* v. *Fry* (1817), 1 Moore (C. P.), 74; *Baron* v. *Husband* (1833), 4 B. & Ad. 611.

(*b*) *Jones* v. *Carter* (1845), 8 Q. B. 134. Debts and other choses in action are now, however, assignable; see p. 494, *post*.

(*c*) See p. 505, *post*.

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Money had and received.

Definite sum of money.

970. It is always necessary that the money claimed as having been had and received to the plaintiff's use should be a defined and ascertained sum (*d*), and money or its equivalent must have been actually received by the defendant (*e*), or at least the defendant must be estopped from denying its receipt (*f*). Thus, no claim for money had and received can as a general rule be maintained where the defendant has in fact received goods and not money (*g*); but the action lies where there is a presumption that goods received by the defendant have been converted into money (*h*), and things which can readily be turned into money have often been treated as equivalent to money for this purpose (*i*).

Must be plaintiff's money.

Moreover, the money must be either the plaintiff's money (*k*) or money in which he is directly interested (*l*), and the money or

(*d*) *Harvey* v. *Archbold* (1825), 3 B. & C. 626; *Garbett* v. *Veale* (1843), 5 Q. B 408. In the latter case the plaintiff, an execution creditor of one partner, who had seized under a *fi. fa.*, claimed against the assignee in bankruptcy, who had sold the goods seized by the sheriff, on behalf of the creditors of the partnership firm. The plaintiff's claim was held not ascertained, because the amount available to satisfy it was only the surplus after payment of partnership debts and depended on a settlement of accounts. So it was held in *Bovill* v. *Hammond* (1827), 6 B. & C. 149, that the action does not lie for a demand arising out of a partnership transaction, the proper remedy between partners being an account; see also *Edwards* v. *Bates* (1844), 8 Scott (N. R.), 406.

(*e*) See note (*n*), p. 477, *post*.

(*f*) *Prince* v. *Oriental Bank Corporation* (1878), 3 App. Cas. 325, P. C., *per* Sir MONTAGUE E. SMITH, at p. 328.

(*g*) Even though such goods have been seized by the plaintiff as distress and returned to the defendant on a promise to pay rent due to the plaintiff. In such case the goods remain the defendant's goods, and are not money had and received to the plaintiff's use (*Leery* v. *Goodson* (1792), 4 Term Rep. 687).

(*h*) *Longchamp* v. *Kenny* (1779), 1 Doug. (K. B.) 137. Where goods were expressly intrusted to plaintiff for sale, and, defendant wrongfully obtaining possession of them, plaintiff was compelled to pay their value to the owner, for which he sued defendant (*Hunter* v. *Welsh* (1816), 1 Stark. 224).

(*i*) *E.g.*, country bank notes (*Pickard* v. *Bankes* (1810), 13 East, 20); rupees (*Ehrensperger* v. *Anderson* (1848), 3 Exch. 148, but see *M'Lachlan* v. *Evans* (1827), 1 Y. & J. 380); a set off or such similar adjustment of accounts as will put the parties in the same position as if money had passed (*Standish* v. *Ross* (1849), 3 Exch. 527; *Wilson* v. *Coupland* (1821), 5 B. & Ald. 228; *Spratt* v. *Hobhouse* (1827), 4 Bing. 173; and see *Longchamp* v. *Kenny*, *supra*; but see also *Lee* v. *Merrett* (1846), 8 Q. B. 820), a bill treated as payment (*Barclay* v. *Gooch* (1797), 2 Esp. 571), but not a bill not yet due (*Atkins* v. *Owen* (1836), 4 Ad. & El. 819).

(*k*) Not necessarily his identical coins (*Follett* v. *Hoppe* (1847), 5 C. B. 226, at p. 240; *Allanson* v. *Atkinson* (1813), 1 M. & S. 583). It will be treated as the plaintiff's money for the purpose of this action if the plaintiff parted with it in the *bonâ fide* belief that it was his own and under a mistake of fact (*Standish* v. *Ross* (1849), 3 Exch. 527).

(*l*) An agent paying his principal's money under a mistake of fact may maintain this action in order to free himself from liability (*Colonial Bank* v. *Exchange Bank of Yarmouth, Nova Scotia* (1885), 11 App. Cas. 84, P. C.); similarly a husband in respect of his wife's goods (*Fell* v. *Whittaker* (1871), L. R. 7 Q. B. 120). Where a tenant by his landlord's direction paid rent to a third person, it was held that, since the tenant had paid his own money and not the landlord's, this action would not lie at the suit of the landlord against the third person (*Leader* v. *Leader* (1871), 6 I. R. C. L. 20; there was also want of privity). Money in the custody of the law is not the plaintiff's money (*Yates* v. *Eastwood* (1851), 6 Exch. 805, 806). See analogous cases, p. 470, *ante*.

its equivalent must be clearly proved to have come into the defendant's hands (*m*).

SECT. 4. **Money had and received.**

971. The action for money had and received is not maintainable where the parties cannot be restored to their original position (*n*), nor where the real question at issue is the title to land (*o*), nor where a special remedy is provided (*p*).

When action not maintainable.

972. There are also cases in which on equitable grounds the action cannot be maintained. Thus, it has been said that where money has been paid which was due in honour and conscience the amount so paid cannot be recovered back, although payment could not have been legally enforced by the defendant (*q*). The commonest examples are payments the claim to which could have been resisted on the grounds of infancy or the Statute of Limitations, and payments in respect of gaming and wagering contracts.

Debt of honour.

973. A person who voluntarily (*r*) pays a sum of money on another person's demand cannot claim a return thereof from the person to

Voluntary payment.

(*m*) *Scott* v. *Miller* (1837), 3 Bing. (N. C.) 811.

(*n*) *Blackburn* v. *Smith* (1848), 2 Exch. 783; *Hunt* v. *Silk* (1804), 5 East, 449; *Anglo-Egyptian Navigation Co.* v. *Rennie* (1875), L. R. 10 C. P. 271, at p. 284; *Freeman* v. *Jeffries* (1869), L. R. 4 Exch. 189; but see *Standish* v. *Ross* (1849), 3 Exch. 527. Such a case arises, for example, where the plaintiff has had possession of the defendant's goods during a certain period and it is impossible to ascertain of what profits the defendant has been deprived (*Beed* v. *Blandford* (1828), 2 Y. & J. 278; and see *Clarke* v. *Dickson* (1858), E. B. & E. 148).

(*o*) *Lindon* v. *Hooper* (1776), 1 Cowp. 414; but this rule does not apply where only past rents are in question (*Monypenny* v. *Bristow* (1832), 2 Russ. & M. 117; and see *Newsome* v. *Graham* (1829), 10 B. & C. 234).

(*p*) *Atkinson* v. *Woodhall* (1862), 1 H. & C. 170; and see note (*r*), *infra*.

(*q*) *Munt* v. *Stokes* (1792), 4 Term Rep. 561; *Bize v. Dickason* (1786), 1 Term Rep. 285; *Farmer* v. *Arundel* (1772), 2 Wm. Bl. 824. Probably to-day such payments would be classed under the head of voluntary payments (see *infra*); for payments under illegal contracts, see p. 487, *post*.

(*r*) The meaning of voluntary is the same as in sect. 2, "Money paid," p. 467, *ante*, and many cases are common to both sections upon this point. The line dividing voluntary and compulsory payments is often a narrow one; thus, an excessive payment to a water company on demand without threat was held to be voluntary (*Slater* v. *Burnley Corporation* (1888), 59 L. T. 636; in this case the county court judge (whose decision was reversed) had held that the company's power to cut off the water supply amounted to compulsion); and payment made by a tenant after distress to recover his goods has been held voluntary, on the ground that, even if his goods were wrongfully distrained, the tenant had his remedy of replevin, or perhaps excessive distress (*Skeate* v. *Beale* (1840), 11 Ad. & El. 983, 991; but see *Graham* v. *Tate* (1813), 1 M. & S. 609, explained and distinguished in *Yates* v. *Eastwood* (1851), 6 Exch. 805, the last case being followed in *Evans* v. *Wright* (1857), 2 H. & N. 527), and was not bound to pay the whole amount (*Glynn* v. *Thomas* (1856), 11 Exch. 870, Ex. Ch.; *Lindon* v. *Hooper* (1776), 1 Cowp. 414; *Knibbs* v. *Hall* (1794), 1 Esp. 84; *French* v. *Phillips* (1856), 2 Jur. (N. S.) 1169, Ex. Ch.). If the landlord sells the goods, thus making replevin impossible, it would appear from the judgment in *Glynn* v. *Thomas*, *supra*, that the action lies; but see *Yates* v. *Eastwood*, *supra*, and *Evans* v. *Wright*, *supra*, where it was held that this action would not lie against a landlord who had omitted to leave the surplus after sale in the hands of the sheriff under stat. 2 Will. & Mar. c. 5, because another remedy was still available. The action lies if there is tender before impounding (*Loring* v. *Warburton* (1858), E. B. & E. 507, where it was said *Glynn* v. *Thomas*, *supra*, was not to be extended; *Green* v.

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whom payment was made as money had and received to his use, for, since he might have resisted the demand, the payment must be taken to have been voluntary (*a*); but, if the payment is made under duress or some other form of compulsion other than legal compulsion, it is not deemed to be a voluntary payment, and the amount may be recovered back in this form of action.

Payment under duress.

A payment is not considered voluntary when made under threat of a penal action (*b*), or of an execution (*c*), even though no execution could lawfully issue (*d*), nor when illegally demanded and paid under colour of an Act of Parliament (*e*) or of an office (*f*), or under an arbitrator's award which is *ultra vires* (*g*), nor when one party is in a position to dictate terms to the other (*h*); nor is a payment considered voluntary merely because the person making it has not waited to be sued (*i*) or has been allowed time for payment (*k*). There may be "practical" as well as "actual legal" compulsion (*l*).

Wrongful detention of goods.

974. As a general rule payments made to recover goods wrongfully detained (other than goods distrained for rent) are not deemed to be voluntary, and may be recovered. This rule applies to payments made under protest to a railway company (*m*), or

Duckett (1883), 11 Q. B. D. 275; *Browne* v. *Powell* (1827), 4 Bing. 230, the last three being cases of distress damage feasant; and see *Fell* v. *Whittaker* (1871), L. R. 7 Q. B. 120).

(*a*) *Brown* v. *M'Kinally* (1795), 1 Esp. 279; *Denby* v. *Moore* (1817), 1 B. & Ald. 123; *Andrew* v. *Bridgman*, [1908] 1 K. B. 596, C. A. Protest, if followed by acquiescence, will not prevent payment from being voluntary (*Spragg* v. *Hammond* (1820), 2 Brod. & Bing. 59; *Gulliver* v. *Cosins* (1845), 1 C. B. 788); but see *Andrew* v. *Bridgman*, *supra*, where the question as to the effect of protest was raised but not decided. Payment of an illegal demand has been said not to be subject of action for money had and received unless paid under an immediate and urgent necessity, or as otherwise expressed, unless to redeem one's person or goods (see *Dawson* v. *Remnant* (1806), 6 Esp. 24; *Fulham* v. *Down* (1798), *ibid.*, 26, n.).

(*b*) *Unwin* v. *Leaper* (1840), 1 Man. & G. 747; *Taylor* v. *Lendey* (1807), 9 East, 49.

(*c*) *Hills* v. *Street* (1828), 5 Bing. 37.

(*d*) *Garratt* v. *Hooper* (1831), 1 Dowl. 28; nor is payment to the sheriff in such case payment "under a legal process" (see p. 488, *post*) so as not to be recoverable (*Valpy* v. *Manley* (1845), 1 C. B. 594; *Snowden* v. *Davis* (1808), 1 Taunt. 359).

(*e*) *Lewis* v. *Hammond* (1818), 2 B. & Ald. 206; *Steele* v. *Williams* (1853), 8 Exch. 625; *Hooper* v. *Exeter Corporation* (1887), 56 L. J. (Q. B.), 457.

(*f*) *Traherne* v. *Gardner* (1856), 5 E. & B. 913; *Hills* v. *Street* (1828), 5 Bing. 37; *Morgan* v. *Palmer* (1824), 4 Dow. & Ry. (K. B.) 283; *Dew* v. *Parsons* (1819), 2 B. & Ald. 562 (though the money is paid under a mistake of law); and see *Waterhouse* v. *Keen* (1825), 4 B. & C. 200.

(*g*) *Re Coombs* (1850), 4 Exch. 839; *Fernley* v. *Branson* (1851), 20 L. J. (Q. B.) 178; *Barnes* v. *Braithwaite* (1857), 2 H. & N. 569.

(*h*) And such payments may sometimes be recovered even though paid under an illegal contract (p. 487, *post*).

(*i*) *Aicken* v. *Macklin* (1838) 1 Dr. & Wal. 621, 636.

(*k*) *Carter* v. *Carter* (1829), 5 Bing. 406.

(*l*) *North* v. *Walthamstow Urban District Council* (1898), 62 J. P. 836; but see, however, *Ellis* v. *Bromley Rural District Council* (1899), 81 L. T. 224.

(*m*) *Parker* v. *Bristol and Exeter Rail. Co.* (1851), 6 Exch. 702; and see *Great Western Rail. Co.* v. *Sutton* (1869), L. R. 4 H. L. 226; *Baxendale* v. *Great Western Rail. Co.* (1864), 16 C. B. (N. S.) 137, Ex. Ch.; *Parker* v. *Great Western Rail. Co.* (1844), 7 Scott (N. R.), 835; *London and North Western Rail. Co.* v.

carrier (*n*), or pawnbroker (*o*) wrongfully detaining goods, or a solicitor or other person wrongfully detaining deeds (*p*), or to a person claiming to charge for the keep of a chattel on which he only has a lien (*q*). But where goods are seized or detained under a *bonâ fide* claim, and not for the purpose of exacting money, and the plaintiff recovers them by a payment not made under protest, but under an agreement made for good consideration in compromise of the claim, he cannot recover back the amount so paid (*r*).

Principal and agent.

975. The action for money had and received lies at the suit of a principal against his agent, for money of the principal in the agent's hands, or for any profit made by the agent in the course of his agency beyond his proper remuneration (*s*). The action also lies at the suit of the principal against any person who has agreed to pay a bribe to an agent (*t*); but the action does not lie at the suit of a third person against an agent who has accounted to his own principal for money received by him for the principal's use from such third person before notice not to part with it (*u*), unless it was obtained by duress or by means of some other wrong on the part of the agent (*a*); and where an agent, being himself a debtor, receives money on behalf of his principal which his creditor, with the knowledge that it is the principal's money, obtains and retains against the agent's debt to himself, the principal may recover the

Evershed (1878), 3 App. Cas. 1029; *Edwards* v. *Great Western Rail. Co.* (1851), 11 C. B. 588; *Piddington* v. *South Eastern Rail. Co.* (1858), 5 C. B. (N. S.) 111; *Baxendale* v. *Eastern Counties Rail. Co.* (1858), 4 C. B. (N. S.) 63; *Finnie* v. *Glasgow and South-Western Rail. Co.* (1855), 2 Macq. 177, H. L.

(*n*) *Ashmole* v. *Wainwright* (1842), 2 Q. B. 837.

(*o*) *Astley* v. *Reynolds* (1731), 2 Stra. 915.

(*p*) *Pratt* v. *Vizard* (1833), 5 B. & Ad. 808; *Wakefield* v. *Newbon* (1844), 6 Q. B. 276; *Fraser* v. *Pendlebury* (1861), 31 L. J. (C. P.) 1; *Close* v. *Phipps* (1844), 7 Man. & G. 586; *Oates* v. *Hudson* (1851), 6 Exch. 346; *Smith* v. *Sleap* (1844), 12 M. & W. 585.

(*q*) *Somes* v. *British Empire Shipping Co.* (1860), 8 H. L. Cas. 338; see also *Atlee* v. *Backhouse* (1838), 3 M. & W. 633, *per* Lord ABINGER, C.B., at p. 645; *Shaw* v. *Woodcock* (1827), 7 B. & C. 73.

(*r*) *Atlee* v. *Backhouse* (1838), 3 M. & W. 633; *Callisher* v. *Bischoffsheim* (1870), L. R. 5 Q. B. 449; see also *Re Blythe, Ex parte Banner* (1881), 17 Ch. D. 480, C. A.

As to the recovery of money paid under a mistake of fact or law, see title MISTAKE.

(*s*) For various illustrations and exceptions, see title AGENCY, Vol., I., pp. 223 *et seq.* The agency and the receipt of the money must be clearly proved (*Clarance* v. *Marshall* (1834), 2 Cr. & M. 495; *Wells* v. *Ross* (1817), 7 Taunt. 403).

(*t*) *Grant* v. *Gold Exploration and Development Syndicate*, [1900] 1 Q. B. 233, C. A.; *Hovenden & Sons* v. *Millhoff* (1900), 83 L. T. 41, C. A.

(*u*) *Taylor* v. *Metropolitan Rail. Co.*, [1906] 2 K. B. 55; *Holland* v. *Russell* (1863), 4 B. & S. 14; *Owen & Co.* v. *Cronk*, [1895] 1 Q. B. 265, C. A.; *Shand* v. *Grant* (1863), 15 C. B. (N. S.) 324. For many other instances see title AGENCY, Vol. I., pp. 223 *et seq.*, and for cases illustrating the difference in this respect between an agent receiving money by mistake and accounting therefor and a person receiving money by mistake for his own benefit, see *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.* (1907), 97 L. T. 263, H. L., and *Continental Caoutchouc and Gutta Percha Co.* v. *Kleinwort, Sons & Co.* (1904), 90 L. T. 474, C. A.

(*a*) *Steele* v. *Williams* (1853), 8 Exch. 625; *Re Chapman, Ex parte Edwards* (1884), 13 Q. B. D. 747, C. A.; *Sharland* v. *Mildon* (1846), 5 Hare, 469; *Smith* v. *Sleap* (1844), 12 M. & W. 585; *Close* v. *Phipps* (1844), 7 Man. & G. 586; *Wakefield* v. *Newbon* (1844), 6 Q. B. 276; *Oates* v. *Hudson* (1851), 6 Exch. 346.

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money from the creditor of the agent as money had and received to his (the principal's) use (*b*).

Stakeholder.

976. A stakeholder who has received money for the express purpose of holding it until it has been ascertained who is entitled thereto is liable in this form of action if he wrongfully parts with the money (*c*), and this principle applies to the case of an auctioneer holding a deposit (*d*); but the stakeholder is not bound to pay until it has been decided who is entitled to the money and the decision has been communicated to him (*e*). Similarly, a person to whom money has been intrusted for a specific purpose is liable if he fails to apply the money as directed or to account for it (*f*).

Deposit at auction.

977. A solicitor who receives a deposit on behalf of a vendor at a sale by auction is *primâ facie* an agent of the vendor only, and not a stakeholder (*g*); consequently there is no privity of contract between him and the purchaser, and an action against him at the suit of the purchaser for money had and received will not lie, even if the sale goes off owing to the vendor's default (*h*). An auctioneer, however, who receives a deposit under such circumstances is none the less a stakeholder because he may happen to be also a solicitor (*i*), and it is competent in any case for the parties to agree that the solicitor shall hold the deposit in the capacity of a stakeholder (*k*).

(*b*) *Litt* v. *Martindale* (1856), 18 C. B. 314.

(*c*) *Cowling* v. *Beachum* (1823), 7 Moore (C. P.), 465; *Sadler* v. *Smith* (1869), L. R. 5 Q. B. 40, Ex. Ch.

(*d*) *Duncan* v. *Cafe* (1837), 2 M. & W. 244; *Gray* v. *Gutteridge* (1828), 1 Man. & Ry. (K. B.) 614; *Furtado* v. *Lumley* (1890), 6 T. L. R. 168; *Harington* v. *Hoggart* (1830), 1 B. & Ad. 577; *Burrough* v. *Skinner* (1770), 5 Burr. 2639; and see *Edwards* v. *Hodding* (1814), 5 Taunt. 815; but otherwise when the deposit is paid to an agent for the vendor (*Ellis* v. *Goulton*, [1893] 1 Q. B. 350, C. A.).

(*e*) *Wilkinson* v. *Godefroy* (1839), 9 Ad. & El. 536; *Lee* v. *Munn* (1817), 1 Moore (C. P.), 481; *Gaby* v. *Driver* (1828), 2 Y. & J. 549; *Brown* v. *Overbury* (1856), 11 Exch. 715. For the position of a stakeholder in a gaming transaction, see title GAMING AND WAGERING.

(*f*) *Parry* v. *Roberts* (1835), 3 Ad. & El. 118; *Re Strachan, Ex parte Cooke* (1876), 4 Ch. D. 123, C. A.; *Hancock* v. *Smith* (1889), 41 Ch. D. 456, C. A.; *Re Wreford, Carmichael* v. *Rudkin* (1897), 13 T. L. R. 153; *Scott* v. *Surman* (1743), Willes, 400; *Giles* v. *Perkins* (1807), 9 East, 12; *Thompson* v. *Giles* (1823), 3 Dow. & Ry. (K. B.) 733; *Ex parte Sollers* (1811), 18 Ves. 229; *Ex parte Rowton* (1810), 17 Ves. 426; *Ex parte Bond* (1840), 1 Mont. D. & De G. 10; *Ex parte Froggatt* (1843), 3 Mont. D. & De G. 322; but the action will not lie to recover a sum paid on trust for a specific purpose, unless the trust is closed and a balance remains in the trustee's hands (*Case* v. *Roberts* (1817), Holt (N. P.), 500).

(*g*) *Edgell* v. *Day* (1865), L. R. 1 C. P. 80; *Bamford* v. *Shuttleworth* (1840), 11 Ad. & El. 926; *Ellis* v. *Goulton*, [1893] 1 Q. B. 350, C. A.; *Hurley* v. *Baker* (1846), 16 M. & W. 26.

(*h*) *Bamford* v. *Shuttleworth*, *supra*; *Ellis* v. *Goulton*, *supra*. The action, however, lies against the vendor, even before the vendor has received payment over from his agent (*Norfolk* (*Duke*) v. *Worthy* (1808), 1 Camp. 337).

(*i*) *Edwards* v. *Hodding* (1814), 5 Taunt. 815.

(*k*) *Edgell* v. *Day*, *supra*, *per* KEATING, J., at p. 85; see *Wiggins* v. *Lord* (1841), 4 Beav. 30.

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Failure of consideration.

978. Where money has been paid for a consideration which has wholly failed, the person who made the payment may recover the money back as money had and received to his use. This rule is not intended to relieve persons from the results of bad bargains or to mitigate the rule of "*caveat emptor*" (*l*); thus, a plaintiff who has purchased a thing which without his knowledge has ceased to exist at the time of sale is entitled to repayment of the price paid by him (*m*), but if the thing purchased existed for a moment after the purchase there would be no total failure of consideration, and the price would not be recoverable (*m*); so, if a plaintiff who has purchased an estate is unable to obtain a legal conveyance, he may recover any purchase-money paid (*n*), but if he has merely purchased an estate with an imperfect title he has obtained some valuable consideration, and, whatever other remedy may be open to him, he cannot recover any sum paid in this form of action (*o*).

(*l*) *Bree* v. *Holbech* (1781), 2 Doug. (K. B.) 654; *Clare* v. *Lamb* (1875), L. R. 10 C. P. 334, and cases in next three notes; *Griffin* v. *Caddell* (1875), 9 I. R. C. L. 488.

(*m*) *Strickland* v. *Turner* (1852), 7 Exch. 208 (a purchase of an annuity which had ceased at the time of purchase); but a policy of reinsurance made after the risk has determined is good and the premium paid thereunder cannot be recovered back (*Bradford* v. *Symondson* (1881), 7 Q. B. D. 456, C. A.; and see *Lawes* v. *Purser* (1856), 6 E. & B. 930); *Begbie* v. *Phosphate Sewage Co.* (1876), 1 Q. B. D. 679, C. A.

(*n*) *Johnson* v. *Johnson* (1802), 3 Bos. & P. 162; *Cripps* v. *Reade* (1796), 6 Term Rep. 606; see also *Bree* v. *Holbech* (1781), 2 Doug. (K. B.) 654; *Simmons* v. *Heseltine* (1858), 5 C. B. (N. S.) 554; *Newsome* v. *Graham* (1829), 10 B. & C. 234.

(*o*) *Johnson* v. *Johnson*, *supra*; *Clare* v. *Lamb* (1875), L. R. 10 C. P. 334; see also *Stray* v. *Russell* (1859), 1 E. & E. 888 (affirmed in Ex. Ch.); and *Begbie* v. *Phosphate Sewage Co.* (1876), 1 Q. B. D. 679, C. A.; and *Thomas* v. *Brown* (1876), 1 Q. B. D. 714; *Ashworth* v. *Mounsey* (1853), 9 Exch. 175; *Beavan* v. *M'Donnell* (1854), 9 Exch. 309. Other instances of failure of consideration arise where the plaintiff pays for shares or goods which he never obtains (*Wilkinson* v. *Lloyd* (1845), 7 Q. B. 27; *Hudson* v. *Robinson* (1816), 4 M. & S. 475; *Kempson* v. *Saunders* (1826), 2 C. & P. 366. See *Dutch* v. *Warren* (1720), 1 Stra. 406, and notes thereto; *Fleming* v. *Loe*, [1901] 2 Ch. 594), or purchases a thing which is substantially different from what it purports to be (*Gurney* v. *Womersley* (1854), 4 E. & B. 133; *Gompertz* v. *Bartlett* (1853), 2 E. & B. 849; *Young* v. *Cole* (1837), 3 Bing. (N. C.) 724; and see *Lamert* v. *Heath* (1846), 15 M. & W. 486). But it must be substantially a different thing, not merely lacking some quality so as to give rise to an action for breach of warranty (*Gurney* v. *Womersley*, *supra*). Breach of warranty is not failure of consideration (*Street* v. *Blay* (1831), 2 B. & Ad. 456, 462; *Gompertz* v. *Denton* (1832), 1 Cr. & M. 207; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 53; and see title SALE OF GOODS). Nor is there a total failure of consideration where the seller impliedly warranted that he was the owner of the goods, whereas they were stolen and subsequently claimed by the true owner (*Eichholz* v. *Bannister* (1864), 17 C. B. (N. S.) 708; but see *Chapman* v. *Speller* (1850), 14 Q. B. 621, and cases as to purchase of a bad title, note (*n*), *supra*). But there is a total failure of consideration where a plaintiff pays money for or under a lease which the defendant is unable to grant (*Wright* v. *Colls* (1849), 8 C. B. 150; *Newsome* v. *Graham* (1829), 10 B. & C. 234); or on a policy avoided by the plaintiff's own innocent misrepresentation (*Anderson* v. *Thornton* (1853), 8 Exch. 425; and see *Skillett* v. *Fletcher* (1866), L. R. 2 C. P. 469); *à fortiori* where there has never been any consideration (*Stevenson* v. *Snow* (1761), 3 Burr. 1237). But the premium is not recoverable where the policy is avoided by the plaintiff's fraudulent misrepresentation (*Anderson* v. *Thornton*, *supra*). A payment on an

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Deposit on contract not completed.

979. A deposit which has been paid in pursuance of a contract which has never been completed, or has been rescinded, is as a general rule recoverable (*p*) unless it has been forfeited by the plaintiff's default (*q*). But where the deposit has been paid, not to an auctioneer or person in the position of a stakeholder, but to the agent of the vendor direct, it is not recoverable from the agent personally, but only from the vendor (*r*).

insurance when the insured recovers his loss from other sources is a payment for a consideration which totally fails, because a contract of insurance is only a contract of indemnity (*Dorrell* v. *Tibbitts* (1880), 5 Q. B. D. 560, C. A.; and see title INSURANCE); so, a payment for a void annuity (*Weddel* v. *Lynam* (1795), 1 Esp. 309; *Scurfield* v. *Gowland* (1805), 6 East, 241); or if any of the securities for the annuity are set aside (*Scurfield* v. *Gowland*, *supra*; *Huggins* v. *Coates* (1843), 5 Q. B. 432; see *Richards* v. *Barton* (1795), 1 Esp. 268); unless the annuity is rendered void by the act or default of the purchaser (*Weddel* v. *Lynam*, *supra*; *Waters* v. *Mansell* (1810), 3 Taunt. 56). In any case six years' payments thereunder may be set off (*Hicks* v. *Hicks* (1802), 3 East, 16); and if all payments have been fully paid the purchase price is not recoverable (*Davis* v. *Bryan* (1827), 6 B. & C. 651). A payment for conduct money on a subpœna to defray the expenses of a journey, where, the action being settled, no journey is ever made, is a payment the consideration for which has wholly failed (*Martin* v. *Andrews* (1856), 7 E. & B. 1); and so is a payment on the faith of a contract to be made by the payer's agent, but which is never in fact entered into (*Bostock* v. *Jardine* (1865), 3 H. & C. 700); so, a payment in pursuance of a conditional contract where the condition is never fulfilled (*Wright* v. *Newton* (1835), 2 Cr. M. & R. 124; *Hooper* v. *Treffry* (1847), 1 Exch. 17; see *Head* v. *Tattersall* (1871), L. R. 7 Exch. 7; but see *Hardingham* v. *Allen* (1848), 5 C. B. 793), or in pursuance of a contract which the plaintiff is unable to carry out by reason of the defendant's default (*Giles* v. *Edwards* (1797), 7 Term Rep. 181; *Ehrensperger* v. *Anderson* (1848), 3 Exch. 148; but compare *Cooke* v. *Munstone* (1805), 1 Bos. & P. (N. R.) 351), or by reason of defendant's death causing total failure of consideration (*Knowles* v. *Bovill* (1870), 22 L. T. 70); or of a contract which has been rescinded (*Towers* v. *Barrett* (1786), 1 Term Rep. 133; *Pulbrook* v. *Lawes* (1876), 1 Q. B. D. 284). But if the contract has been broken the plaintiff can only recover damages for the breach (*Davis* v. *Street* (1823), 1 C. & P. 18); nor does the action lie for money paid under a contract which is still open (*Weston* v. *Downes* (1778), 1 Doug. (K. B.) 23). For the case of money paid over in anticipation by an agent, but never actually received by him, see *Gingell* v. *Glascock* (1831), 8 Bing. 86.

(*p*) *Greville* v. *Da Costa* (1797), Peake, Add. Cas. 113; *Wilde* v. *Fort* (1812), 4 Taunt. 334; *Lloyd* v. *Crispe* (1813), 5 Taunt. 250; *Wrighton* v. *Newton* (1835), 2 Cr. M. & R. 124; *Gosbell* v. *Archer* (1835), 2 Ad. & El. 500, 508; *Moeser* v. *Wisker* (1871), L. R. 6 C. P. 120; and see *Maberley* v. *Robins* (1814), 5 Taunt. 625; but the contract, if completed, must have been rescinded either by act of the parties or by operation of law (*Fitt* v. *Cassanet* (1842), 5 Scott (N. R.), 902, 907; *Early* v. *Garret* (1829), 9 B & C. 928; *Clare* v. *Lamb* (1875), 44 L. J. (C. P.) 177). See title SALE OF LAND. "Advance" freight is not in the nature of a deposit, but becomes the property of the shipowner immediately it is paid, and cannot be recovered back though the goods are lost on the voyage (*De Silvale* v. *Kendall* (1815), 4 M. & S. 37; *Saunders* v. *Drew* (1832), 3 B. & Ad. 445; *Allison* v. *Bristol Marine Insurance Co.* (1876), 1 App. Cas. 209; *Byrne* v. *Schiller* (1871), L. R. 6 Exch. 319, Ex. Ch.; and see *Civil Service Co-operative Society* v. *General Steam Navigation Co.*, [1903] 2 K. B. 756, C. A.).

(*q*) *Soper* v. *Arnold* (1889), 14 App. Cas. 429; *Thomas* v. *Brown* (1876), 1 Q. B. D. 714, and cases there cited. If, however, there is an express agreement as to the deposit, these rules, so far as they are inconsistent with such agreement, have no application (*Essex* v. *Daniell*, *Daniell* v. *Essex* (1875), L. R. 10 C. P. 538; *Lea* v. *Whitaker* (1872), L. R. 8 C. P. 70; and see *Hinton* v. *Sparkes* (1868), L. R. 3 C. P. 161).

(*r*) *Ellis* v. *Goulton*, [1893] 1 Q. B. 350, C. A.

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980. Similarly, if a payment is made under a judgment which has become void (*s*), or in respect of a worthless (*t*) or forged instrument (*a*), the amount paid is recoverable in this form of action, provided notice of claim is given before the position of the person to whom payment has been made has become altered to his detriment (*b*).

Payments under void judgment etc.

If a plaintiff has advanced money towards a scheme which has proved abortive he may recover it back in this form of action (*c*), and cannot be compelled to deduct from his claim expenses incurred without his authority (*d*).

Abortive scheme.

981. Where, however, a sum of money is paid for an entire consideration, and only a partial failure of the consideration ensues, no proportionate part of the amount paid can be recovered as money had and received to the payer's use (*e*). This principle applies where a premium is paid for the purpose of learning a trade or profession and either the person paying or receiving the premium dies before the period of tuition is completed (*f*).

Partial failure of consideration.

(*s*) *Farrow* v. *Mayes* (1852), 18 Q. B. 516; but so long as the judgment remains in force no action lies to recover money levied under it by reason that such judgment was obtained fraudulently or otherwise (see p. 488, *post*).

(*t*) *Timmins* v. *Gibbins* (1852), 18 Q. B. 722. The person obtaining change in good faith for a cheque which proves worthless must bear the loss (S. C., *ibid*, at p. 726).

(*a*) *Jones* v. *Ryde* (1814), 5 Taunt. 488; *Bruce* v. *Bruce* (1814), 5 Taunt. 495, note distinguishing *Price* v. *Neal* (1762), 3 Burr. 1354; *Wilkinson* v. *Johnson* (1824), 3 B. & C. 428. See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 58 (3); *Smith* v. *Mercer* (1815), 6 Taunt. 76; *Camidge* v. *Allenby* (1827), 6 B. & C. 373; *Miller* v. *Race* (1758), 1 Burr. 452; 2 Smith, L. C., 11th ed., 463; but the plaintiff cannot recover where the fraud was perpetrated by his own agent (*Foster* v. *Green* (1862), 7 H. & N. 881).

(*b*) *Cocks* v. *Masterman* (1829), 9 B. & C. 902 (explaining *Wilkinson* v. *Johnson* (1824), 3 B. & C. 428, and other cases). Here delay in giving notice of the forgery prevented the plaintiff from recovering, the holder of a bill being entitled to know on the day it becomes due whether it will be honoured. This case was followed in *London and River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q. B. 7; and see *Pollard* v. *Bank of England* (1871), L. R. 6 Q. B. 623; *Turner* v. *Stones* (1843), 1 Dow. & L. 122; but this principle does not apply to a Bank of England note (*Leeds Bank* v. *Walker* (1883), 11 Q. B. D. 84, 89).

(*c*) *Nockells* v. *Crosby* (1825), 3 B. & C. 814; *Moore* v. *Garwood* (1849), 4 Exch. 681, Ex. Ch.; *Wulstab* v. *Spottiswoode* (1846), 15 M. & W. 501; and see *Mowatt* v. *Londesborough* (*Lord*) (1854), 4 E. & B. 1, Ex. Ch.; *Johnson* v. *Goslett* (1857), 3 C. B. (N. S.) 569, Ex. Ch.; *Ward* v. *Londesborough* (*Lord*) (1852), 12 C. B. 252; *Ashpitel* v. *Sercombe* (1850), 5 Exch. 147; *Kempson* v. *Saunders* (1826), 4 Bing. 5.

(*d*) *Nockells* v. *Crosby*, *supra*; but it is otherwise where the money has been applied in accordance with his directions (*Phillips* v. *London School Board*, *Cockerton* v. *Same*, [1898] 2 Q. B. 447 C. A.; and see *Lloyd* v. *Sandilands* (1818), Gow, 13).

(*e*) *Learoyd* v. *Brook*, [1891] 1 Q. B. 431, 434, 435; *Colton* v. *Dorrell* (1869), 17 W. R. 672. See judgments in *Whincup* v. *Hughes* (1871), L. R. 6 C. P. 78; *Anglo-Egyptian Navigation Co.* v. *Rennie* (1875), L. R. 10 C. P. 271, 284; *Brett* v. *Clowser* (1880), 5 C. P. D. 376; *Civil Service Co-operative Society* v. *General Steam Navigation Co.*, [1903] 2 K. B. 756, C. A.; *Nicholson* v. *Ricketts* (1860), 6 Jur. (N. S.) 422; *Tyrie* v. *Fletcher* (1777), 2 Cowp. 666; unless, of course, by express agreement (see *Hurst* v. *Orbell* (1838), 8 Ad. & El. 107; *Derby* v. *Humber* (1867), L. R. 2 C. P. 247). Compare *Wrighton* v. *Newton* (1835), 2 Cr. M. & R. 124; *Devaux* v. *Conolly* (1849), 8 C. B. 640.

(*f*) *Whincup* v. *Hughes*, *supra*; *Ferns* v. *Carr* (1885), 28 Ch. D. 409. These cases appear to overrule not only the cases there cited, but such cases as *Chappell* v. *Poles* (1837), 2 M. & W. 867, where it was held that part (or *semble*

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982. Where the defendant has converted goods (*g*), which were obtained or detained from the plaintiff wrongfully, and has turned them into money, the plaintiff is entitled to waive the defendant's tort and sue for the proceeds of the goods as money had and received to his use (*h*), but having once elected to waive the tort he will be precluded from afterwards relying upon it (*i*), while if he elects to affirm a fraudulent transaction he cannot afterwards claim a return of money paid thereunder, even upon a subsequent discovery of a further incident in the same fraud (*k*). But suing as for money had and received only operates as a waiver of the right to recover damages for the wrongful conversion, and does not put the defendant in the same position with regard to claims made by him in respect of the goods as if the conversion had been a lawful act (*l*).

Waiver of tort.

Fraudulent preference.

An action for money had and received also lies at the suit of a trustee in bankruptcy against a creditor who has received money, or goods which he has converted into money, from the bankrupt by way of a fraudulent preference (*m*); or at the suit of an owner of minerals which have been wrongfully raised and sold to recover

the whole) of money paid to parish officers to exonerate the plaintiff from certain charges in respect of a bastard child was, or would be, recoverable. The court, however, in exercise of its summary jurisdiction over its own officers, may order a solicitor to return a portion of the premium paid in respect of an articled clerk, on the premature termination of the articles (*Ex parte Prankerd* (1819), 3 B. & Ald. 257; *Re Harper, Ex parte Bayley* (1829), 9 B. & C. 691; *Re Thompson* (1848), 1 Exch. 864). Compare Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 41.

(*g*) Including a bill or cheque; but see *Rothschild* v. *Corney* (1829), 9 B. & C. 388.

(*h*) *Arris and Arris* v. *Stukeley* (1677), 2 Mod. Rep. 260, at p. 262; *Marsh* v. *Keating* (1834), 1 Bing. (N. C.) 198, at p. 215, H. L.; *Lamine* v. *Dorrell* (1705), 2 Ld. Raym. 1216; *Rodgers* v. *Maw* (1846), 15 M. & W. 444, 448; *Powell* v. *Rees* (1837), 7 Ad. & El. 426; *Young* v. *Marshall* (1831), 8 Bing. 43; *Neate* v. *Harding* (1851), 6 Exch. 349; *Glyn (Bart.)* v. *Baker* (1811), 13 East, 509; *Bavins Junr. & Sims* v. *London and South Western Bank*, [1900] 1 Q. B. 270, C. A.; *Oughton* v. *Seppings* (1830), 1 B. & Ad. 241; *Buchanan* v. *Findlay* (1829), 9 B. & C. 738; and see *Lythgoe* v. *Vernon* (1860), 5 H. & N. 180, where an agent wrongfully sold his principal's goods and received the price. As to the right of a principal to follow money and the proceeds of property wrongfully dealt with by his agent into the hands of third persons, see title AGENCY, Vol. I., p. 203.

(*i*) *Smith* v. *Hodson* (1790), 4 Term. Rep. 211; 2 Smith, L. C., 11th ed., 146; *Wilson* v. *Poulter* (1730), 2 Str. 859; *Smith* v. *Baker* (1873), L. R. 8 C. P. 350; *Lythgoe* v. *Vernon*, *supra*; *Roe* v. *Mutual Loan Fund, Ltd.* (1887), 19 Q. B. D. 347; see *Brewer* v. *Sparrow* (1827), 7 B. & C. 310; as to what amounts to such election, see *Rice* v. *Reed*, [1900] 1 Q. B. 54, C. A., and cases therein cited; *Valpy* v. *Sanders* (1848), 5 C. B. 886; *Armstrong* v. *Allan* (1892), 67 L. T. 738. Where an agent converts the goods of a third person, who elects to waive the tort and sue him for money had and received, the agent is only liable to the extent of the proceeds still remaining in his hands, and not for what he has paid over to the principal in good faith (*Re Ely, Ex parte The Trustee* (1900), 48 W. R. 693, C. A.).

(*k*) *Campbell* v. *Fleming* (1834), 1 Ad. & El. 40, where the plaintiff having bought shares in a company on the faith of a fraudulent statement afterwards dealt with them; *Miles* v. *Dell* (1821), 3 Stark. 23, 26. And see, generally, title TROVER AND CONVERSION.

(*l*) *Hunter* v. *Prinsep* (1808), 10 East, 378 (wrongful sale of cargo by shipmaster: held that the owner was entitled to recover the proceeds from the shipowners without allowing for freight *pro rata itineris*, the claim to charge for such freight being discharged by the conversion).

(*m*) *Marks* v. *Feldman* (1870), L. R. 4 Q. B. 481, Ex. Ch.; *Smith* v. *Baker* (1873), L. R. 8 C. P. 350; *Heilbut* v. *Nevill* (1870), L. R. 5 C. P. 478, Ex. Ch.; *Russell* v. *Bell* (1842), 10 M. & W. 340.

the proceeds (*n*). But where minerals have been wrongfully worked under a *bonâ fide* claim of right, and the owner waives the trespass and sues for money had and received, the defendant is entitled to an allowance for the cost incurred in winning the minerals (*o*).

Trespass to mines.

983. A defendant who has wrongfully received the fees of an office pertaining to the plaintiff has been held liable to account for the fees as money had and received to the plaintiff's use (*p*), and where the holder of an office allows another person to perform the duties of the office under an agreement to divide the fees, such agreement not being illegal, the person so performing the duties may sue in this form of action for his half-share (*q*).

Fees of office.

984. A defendant is liable to this form of action who has obtained money from the plaintiff by fraud, whether it be by fraudulent misrepresentation (*r*) or fraudulent concealment of material facts (*s*), and interest may be recovered on the money so obtained (*t*).

Money obtained by fraud.

Where the plaintiff has himself been party to the fraud he may nevertheless recover if not *in pari delicto* with the defendant (*a*); but the right to sue for money had and received through a fraud is subject to the rule that recourse can only be had to this form of action so long as the plaintiff and the defendant can be restored to their original positions—otherwise the remedy is an action for deceit (*b*).

(*n*) *Powell* v. *Rees* (1837), 7 Ad. & El. 426.

(*o*) *Jegon* v. *Vivian* (1871), 6 Ch. App. 742; and see *Hilton* v. *Woods* (1867), L. R. 4 Eq. 432; *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25; and title MINES, MINERALS AND QUARRIES.

(*p*) *Howard* v. *Wood* (1679), 2 Lev. 245; *King* v. *Alston* (1848), 12 Q. B. 971; *Roberts* v. *Aulton* (1857), 2 H. & N. 432. But this form of action will not lie for money given in connection with an office as a gratuity and not as a regular fee (*Boyter* v. *Dodsworth* (1796), 6 Term Rep. 681), and in an Irish case it has been held that a defendant who has illegally usurped the plaintiff's post and fulfilled his duties and received his salary, though liable to an action for damages, cannot be compelled to hand over such salary as having been received to the plaintiff's use (*Lawlor* v. *Alton* (1873), 8 I. R. C. L. 160).

(*q*) *Rowland* v. *Hall* (1835), 1 Scott, 539.

(*r*) *Holt* v. *Ely* (1853), 1 E. & B. 795; *Hogan* v. *Shee* (1797), 2 Esp. 522; *Andrews* v. *Hawley* (1857), 26 L. J. (EX.) 323; *Crockford* v. *Winter* (1807), 1 Camp. 124; *Kettlewell* v. *Refuge Assurance Co., Ltd.*, [1908] 1 K. B. 545, affirmed H. L. (1909) 25 T. L. R. 395. Money obtained by fraudulent sale can be thus recovered (*Early* v. *Garret* (1829), 9 B. & C. 928, 932).

(*s*) *Billing* v. *Ries* (1841), Car. & M. 26; *Edmeads* v. *Newman* (1823), 1 B. & C. 418; *Martin* v. *Moryan* (1819), 3 Moore (C. P.), 635; *Kendal* v. *Wood* (1871), L. R. 6 Exch. 243, Ex. Ch.

(*t*) *Johnson* v. *R.*, [1904] A. C. 817, at p. 822, P. C.; and see, generally, title MISREPRESENTATION AND FRAUD.

(*a*) The cases illustrating this rule are mostly cases of fraudulent preference of creditors (*Atkinson* v. *Denby* (1862), 7 H. & N. 934, Ex. Ch.; *Smith* v. *Cuff* (1817), 6 M. & S. 160; *Smith* v. *Bromley* (1760), 2 Doug. (K. B.) 696, at p. 697, and notes; *Re Lenzbery's Policy* (1877), 7 Ch. D. 650); see also *Bradshaw* v. *Bradshaw* (1841), 9 M. & W. 29, and *Geere* v. *Mare* (1863), 2 H. & C. 339). Where, however, the defendant has paid over money so received to the plaintiff's assignee in bankruptcy he cannot be made to pay over again to the bankrupt, because a *jus tertii* has intervened, and the money has found its way to the rightful owner (*Sievers* v. *Boswell* (1841), 4 Scott (N. R.), 165).

(*b*) *Clarke* v. *Dickson* (1858), E. B. & E. 148.

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Estoppel.

985. A defendant who has led the plaintiff to believe that he holds money to his use in circumstances where there is a duty upon him to disclose the true facts may be estopped from disputing the plaintiff's claim, or, if he has paid the money, be precluded from recovering it back (*c*).

Principal and agent.

986. In the case of money belonging to a principal being obtained from his agent by fraud, either the principal or the agent may sue for its recovery back as money had and received to his use (*d*), and where an agent has obtained money wrongfully and paid it over to his principal or applied it for his benefit, either the principal (*e*) or the agent (*f*) may be sued for its recovery back.

Payment under illegal contract.

987. Where money has been paid under an illegal contract which has not been wholly or partially carried out, either party may withdraw from the contract and claim a return of the money paid by him thereunder (*g*), provided that the other party can be restored to his original position (*h*) and that the party withdrawing has given the other party notice of his intention to withdraw (*i*).

Deposit on wager.

988. Money deposited in respect of a wager may be recovered from a stakeholder either before (*k*) or after (*l*) the expiration of the time or happening of the event on which the decision of the wager depends, provided it is demanded from the stakeholder before it has been paid over to the winner. Even after payment over the amount may be recovered from the stakeholder, where he has paid it over after demand from the person depositing it

(*c*) *Skyring* v. *Greenwood* (1825), 4 B. & C. 281; *Shaw* v. *Picton* (1825), 4 B. & C. 715; *R.* v. *Lords of the Treasury* (1851), 16 Q. B. 357. For the application of this principle to the case of an agent delivering accounts, see p. 493, *post*.

(*d*) *Holt* v. *Ely* (1853), 1 E. & B. 795; *Litt* v. *Martindale* (1856), 18 C. B. 314. In this case the defendant, having fraudulently obtained the plaintiff's money out of the hands of his agent, claimed to retain it against a debt due to him from the agent; and see *Stevenson* v. *Mortimer* (1778), 2 Cowp. 805. As to an agent's right to sue in the absence of fraud, see *Colonial Bank* v. *Exchange Bank of Yarmouth, Nova Scotia* (1885), 11 App. Cas. 84, P. C.

(*e*) *Reid* v. *Rigby & Co.*, [1894] 2 Q. B. 40; *Marsh* v. *Keating* (1834), 1 Bing. (N. C.) 198, H. L.; *Bannatyne* v. *MacIver*, [1906] 1 K. B. 103, C. A.; *Re Japanese Curtains and Patent Fabric Co., Ex parte Shoolbred* (1880), 28 W. R. 339.

(*f*) See p. 479, *ante*.

(*g*) The return of the money may be claimed on the ground of failure of consideration (*Tappenden* v. *Randall* (1801), 2 Bos. & P. 467, *per* Lord ALVANLEY, C.J.); and see *Taylor* v. *Bowers* (1876), 1 Q. B. D. 291, C. A.; *Lowry* v. *Bourdieu* (1780), 2 Doug. (K. B.) 468, 471; *Bone* v. *Ekless* (1860), 5 H. & N. 925.

(*h*) *Lowry* v. *Bourdieu* (1780), 2 Doug. (K. B.) 468.

(*i*) *Palyart* v *Leckie* (1817), 6 M. & S. 290; *Busk* v. *Walsh* (1812), 4 Taunt. 290.

(*k*) *Aubert* v. *Walsh* (1810), 3 Taunt. 277; *Varney* v. *Hickman* (1847), 5 C. B. 271; *Trimble* v. *Hill* (1879), 5 App. Cas. 342, P. C.; *Martin* v. *Hewson* (1855), 10 Exch. 737.

(*l*) *Cotton* v. *Thurland* (1793), 5 Term Rep. 405; *Diggle* v. *Higgs* (1877), 2 Ex. D. 422, C. A.; *Smith* v. *Bickmore* (1812), 4 Taunt. 474; *Bate* v. *Cartwright* (1819), 7 Price, 540; *Batson* v. *Newman* (1876), 1 C. P. D. 573, C. A.; and see *Robinson* v. *Mearns* (1825), 6 Dow. & Ry. (K. B.) 26; *Hastelow* v. *Jackson* (1828), 8 B. & C. 221; *Hampden* v. *Walsh* (1876), 1 Q. B. D. 189. This rule is not affected by the Gaming Act, 1892 (55 Vict. c. 9), s. 1 (*O'Sullivan* v. *Thomas*, [1895] 1 Q. B. 698; *Burge* v. *Ashley & Smith, Ltd.*, [1900] 1 Q. B. 744, C. A.; *Shoolbred* v. *Roberts*, [1900] 2 Q. B. 497, C. A.).

and without his consent (*m*). But a depositor who has assented to payment being made by the stakeholder to the winner cannot recover (*n*).

Partial performance of illegal contract.

989. Where money has been paid in respect of an illegal contract which has been wholly or partly (*o*) carried out, the general rule is that the amount so paid cannot be recovered back (*p*), the exception being that a payment so made by a party not *in pari delicto* with the other is still recoverable though the contract has been carried out (*q*). Oppression or abuse of a confidential or fiduciary position is sufficient to prevent the parties from being *in pari delicto* (*r*).

Where an illegal contract has been made by the plaintiff with a third person, under which money has been paid by the third person to the defendant for the use of the plaintiff, the defendant is bound to pay over the money so received to the plaintiff, and is not entitled as against him to set up the illegality of the contract under which it was received (*s*), unless the contract between the plaintiff and the defendant is unlawful in itself (*t*). An agent who receives

(*m*) *Hastelow* v. *Jackson* and *Hampden* v. *Walsh*, *supra*; *Hodson* v. *Terrill* (1833), 1 Cr. & M. 797. The mere bringing of an action before payment over is not equivalent to a demand made upon the stakeholder (*Gatty* v. *Field* (1846), 9 Q. B. 431).

(*n*) *Howson* v. *Hancock* (1800), 8 Term Rep. 575; and see title GAMING AND WAGERING.

(*o*) In *Kearley* v. *Thomson* (1890), 24 Q. B. D. 742, C. A., solicitors agreed for a sum of money not to appear at the public examination of a bankrupt nor oppose the order for his discharge (such agreement being contrary to public policy). They neglected to appear at the public examination in part performance of their contract, after which it was held that the amount of the payment to them could not be recovered back. See also *Herman* v. *Jeuchner* (1885), 15 Q. B. D. 561, C. A., overruling *Wilson* v. *Strugnell* (1881), 7 Q. B. D. 548; *Re Myers*, *Ex parte Myers*, [1908] 1 K. B. 941 (money paid in pursuance of a scheme for defrauding creditors).

(*p*) In such cases the maxim *Potior est conditio possidentis* applies (*Andree* v. *Fletcher* (1789), 3 Term Rep. 266; *Howson* v. *Hancock* (1800), 8 Term Rep. 575; *Vandyck* v. *Hewitt* (1800), 1 East, 96; *Thistlewood* v. *Cracroft* (1813), 1 M. & S. 500; *Morck* v. *Abel* (1802), 3 Bos. & P. 35; *Lowry* v. *Bourdieu* (1780), 2 Doug. (K. B.) 468, 471; *Lubbock* v. *Potts* (1806), 7 East, 449; *Drummond* v. *Deey* (1794), 1 Esp. 152; *Goodall* v. *Lowndes* (1844), 6 Q. B. 464; *Stokes* v. *Twitchen* (1818), 8 Taunt. 492). *Lacaussade* v. *White* (1798), 7 Term Rep. 535, an apparent authority to the contrary, has been much doubted, and is probably now not to be relied on. See also *Munt* v. *Stokes* (1792), 4 Term Rep. 561, and *Harse* v. *Pearl Life Assurance Co.*, [1903] 2 K. B. 92.

(*q*) *Chappell* v. *Poles* (1837), 2 M. & W. 867; and cases in next note.

(*r*) For examples, see *Alsager* v. *Spalding* (1838), 4 Bing. (N. C.) 407, and cases there cited; *Smith* v. *Cuff* (1817), 6 M. & S. 160; *Atkinson* v. *Denby* (1862), 7 H. & N. 934, Ex. Ch.; *Lowry* v. *Bourdieu*, *supra*; *Jones* v. *Barkley* (1781), 2 Doug. (K. B.) 684; *Williams* v. *Hedley* (1807), 8 East, 378. It has also been said that, even if the parties are *pares delicto*, money paid may be recovered where public policy requires it (*Whittingham* v. *Burgoyne* (1797), 3 Anst. 900, 904, and see *Morris* v. *MacCulloch* (1763), 2 Eden, 190, and note thereto).

(*s*) *Tenant* v. *Elliott* (1797), 1 Bos. & P. 3; *Williams* v. *Trye* (1854), 23 L. J. (CH.) 860; *Farmer* v. *Russell* (1798), 1 Bos. & P. 296; *Sykes* v. *Beadon* (1879), 11 Ch. D. 170 (*Sharp* v. *Taylor* (1848), 2 Ph. 801, discussed and doubted); see *Bousfield* v. *Wilson* (1846), 16 M. & W. 185.

(*t*) *Booth* v. *Hodgson* (1795), 6 Term Rep. 405; *Knowles* v. *Haughton* (1805), 11 Ves. 168; *Battersby* v. *Smyth* (1818), 3 Madd. 110; *Sykes* v. *Beadon* (1879), 11 Ch. D. 170.

SECT. 4. **Money had and received.**

money under a gaming or wagering contract made on the principal's behalf is bound to pay it over to the principal, and the same rule applies in the case of money received under an illegal contract (*a*), except where the contract between the principal and agent is itself illegal, so that the court by permitting the principal to recover would be lending its aid to give effect to the illegality (*b*). It is, however, a good defence to an action by a principal for money received by his agent under a voidable contract for the agent to show that the contract has been avoided and the money repaid to the other contracting party, even if the contract was avoided on the ground of the agent's fraud (*c*).

Void and voidable contract.

Notice and demand necessary.

It is necessary in all cases, to enable a plaintiff to maintain an action for money paid by mistake as money had and received by the defendant, that notice of the mistake must have been given to the defendant before action brought, and a demand made for payment of the money (*d*).

Compulsion of legal process.

990. Money paid under compulsion of legal process cannot be recovered back as having been received to the payer's use (*e*). Thus, money paid in pursuance of a judgment is not recoverable, even if it was paid under a mistake of fact and the judgment was obtained fraudulently, unless and until it has been set aside (*f*). The rule applies to money paid by mistake under compulsion of a police court summons which is subsequently withdrawn (*g*), and to money paid under compulsion of an excessive distress for rent (*h*), or a wrongful distress damage feasant (*i*), and it

(*a*) *Bridger* v. *Savage* (1885), 15 Q. B. D. 363, C. A.; *De Mattos* v. *Benjamin* (1894), 63 L. J. (Q. B.) 248; and see *Johnson* v. *Lansley* (1852), 12 C. B. 468. A trustee in bankruptcy has no higher right than the bankrupt had at the time to which the trustee's title relates back (*Re Mapleback, Ex parte Caldecott* (1876), 4 Ch. D. 150, C. A.). See, however, *Re Campbell, Ex parte Wolverhampton Banking Co.* (1884), 14 Q. B. D. 32. The trustee may also in certain cases disaffirm the bankrupt's contract; see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 124). He is not, however, bound by an estoppel binding on the bankrupt (*Heilbut* v. *Nevill* (1870), L. R. 5 C. P. 478, 481, Ex. Ch.).

(*b*) See note (*t*), p. 487, *ante*.

(*c*) *Murray* v. *Mann* (1848), 2 Exch. 538.

(*d*) *Freeman* v. *Jeffries* (1869), L. R. 4 Exch. 189, *per* MARTIN and BRAMWELL, BB.; and see *Wilkinson* v. *Godefroy* (1840), 9 Ad. & El. 536; *Kelly* v. *Solari* (1843), 9 M. & W. 54.

(*e*) *Marriot* v. *Hampton* (1797), 7 Term Rep. 269; 2 Smith, L. C., 11th ed., 421.

(*f*) *De Medina* v. *Grove* (1846), 10 Q. B. 152; *Huffer* v. *Allen* (1866), L. R. 2 Exch. 15; *Marriot* v. *Hampton*, *supra*.

(*g*) *Moore* v. *Fulham Vestry*, [1895] 1 Q. B. 399. And see *Ward & Co.* v. *Wallis*, [1900] 1 Q. B. 675, where a plaintiff by mistake gave the defendant credit for a payment on account which had not been made, and the action being settled, it was held that the plaintiff could not recover the amount so credited.

(*h*) *Skeate* v. *Beale* (1840), 11 Ad. & El. 983, 991. The remedy is an action for the excessive distress.

(*i*) *Lindon* v. *Hooper* (1776), 1 Cowp. 414; *Gulliver* v. *Cosens* (1845), 1 C. B. 788. If, however, animals distrained damage feasant are impounded on private premises, a tender of sufficient amends is good and deprives the distress of its character of legal process, and an excessive sum demanded and paid after the tender may be recovered back as money had and received (*Green* v. *Duckett* (1883), 11 Q. B. D. 275; *Browne* v. *Powell* (1827), 4 Bing. 230); otherwise if the tender is made after impounding in a public pound (*Sheriff* v. *James* (1823), 1 Bing. 341; *Singleton* v. *Williamson* (1862), 7 H. & N. 747).

is immaterial in such cases that the money is paid under protest (*k*).

SECT. 4. Money had and received.

SECT. 5.—*Account stated.*

Account stated.

991. Where parties mutually agree that a certain sum is due from one to the other an "account stated" is said to arise, and the law implies a promise on the part of the one from whom such sum has been agreed to be due to pay the same, on which the other party may sue without being put to proof of the correctness of the account (*l*).

The amount due must be specified and not left uncertain (*m*), but a promise to make out an account and pay the balance found due is evidence to support the claim (*n*), and an action on an account stated may be maintained on proof of an acknowledgment of one item of debt (*a*). The admission of liability and of the amount due must, however, be absolute, and not qualified by any condition or reservation (*b*).

Admission.

A verbal admission of a debt due under a written agreement is sufficient to support a claim on an account stated (*c*), and such an admission may be inferred from conduct (*d*). All that is necessary is that the defendant should have shown either by express words or by his conduct that he recognised a specified sum as being due from himself to the plaintiff (*d*). The admission must be made by the defendant himself or by his agent authorised to make the admission (*e*), and must be made to the plaintiff or his agent authorised to receive the admission; an admission to a third person is not sufficient to create an account stated (*f*).

(*k*) *Gulliver* v. *Cosens* (1845), 1 C. B. 788; and see note (*a*), p. 478, *ante*.

(*l*) *Wray* v. *Milestone* (1839), 5 M. & W. 21, 24; *Irving* v. *Veitch* (1837), 3 M. & W. 90, 107; *Foster* v. *Allanson* (1788), 2 Term Rep. 479; *Gretton* v. *Mees* (1878), 7 Ch. D. 839.

(*m*) *Lane* v. *Hill* (1852), 18 Q. B. 252; *Hughes* v. *Thorpe* (1839), 5 M. & W. 656, 667; *Bernasconi* v. *Anderson* (1828), Mood. & M. 183; *Kirton* v. *Wood* (1833), 1 Mood. & R. 253; *Teal* v. *Auty* (1820), 2 Brod. & Bing. 99, 101; *Green* v. *Davies* (1825), 4 B. & C. 235, 242; *Baker* v. *Heard* (1850), 5 Exch. 959.

(*n*) *Pronting* v. *Hammond* (1819), 8 Taunt. 688.

(*a*) *Highmore* v. *Primrose* (1816), 5 M. & S. 65; *Lane* v. *Hill* (1852), 18 Q. B. 252; *Knowles* v. *Michel* (1811), 13 East, 249.

(*b*) *Evans* v. *Verity* (1825), Ry. & M. 239; *Calvert* v. *Baker* (1838), 4 M. & W. 417.

(*c*) *Newhall* v. *Holt* (1840), 6 M. & W. 662; *Singleton* v. *Barrett* (1832), 2 Cr. & J. 368; see *Rigby* v. *Jeffrys* (1839), 7 Dowl. 561.

(*d*) *Salmon* v. *Watson* (1819), 4 Moore (C. P.), 73; *Chisman* v. *Count* (1841), 2 Man. & G. 307 (defendant, on being shown an account by a clerk of the plaintiffs, objected to one item and made no remark as to the others; it was held that there was evidence of an account stated of the items to which no objection was made); *Peacock* v. *Harris* (1808), 10 East, 104 (sum remitted on account, with a promise to pay the remainder); *Porter* v. *Cooper* (1854), 1 Cr. M. & R. 387; *Perry* v. *Slade* (1845), 8 Q. B. 115 (payment of a sum of money expressed to be for interest on a specified amount held evidence of an account stated for that amount).

(*e*) *Hughes* v. *Thorpe* (1839), 5 M. & W. 656, 667; *Grundy* v. *Townsend* (1888), 36 W. R. 531, C. A., *per* LOPES, L.J.; *Miller* v. *Douglas* (1886), 56 L. J. (CH.) 91.

(*f*) It was formerly doubtful whether admission to a third person was sufficient (see *Ashby* v. *Ashby* (1829), 3 Moo. & P. 186, 189; *Bishop* v. *Chambre*

SECT. 5. **Account stated.**

Reopening account.

992. The admission must be accepted by the party to whom it is made, or there is no account stated (*g*), but a party relying on an account stated is at liberty to challenge particular items thereof charged against him, on grounds which would have entitled him to repayment if the items so charged had been paid by him, and to have the account reopened in respect of those items (*h*); and, generally, although the admission has been accepted so as to constitute an account stated, the account may nevertheless be reopened where by mistake too little has been accepted (*i*) or too much admitted (*j*), particularly in cases of fraud and undue influence (*k*).

An unaccepted offer to pay a sum of money being less than the amount claimed is not an account stated (*l*); and to support an account stated the admission must be of a certain sum due to the plaintiff as a subsisting debt (*m*).

Trustees.

993. A trustee by admitting that he holds a balance which is due to the plaintiff renders himself liable to this form of action (*n*), and it is no defence that there has been no valuable consideration other than the existence of the trust for stating the account (*o*).

Privity of contract.

994. The acknowledgment of a debt due creates sufficient privity of contract for the purpose of maintaining the action, and it is not

(1827), 3 C. & P. 55). But all later authorities are unanimous (*Breckon* v. *Smith* (1834), 1 Ad. & El. 488, *per* LITTLEDALE, J., at p. 489; *Tucker* v. *Barrow* (1828), 7 B. & C. 623, *per* LITTLEDALE, J., at p. 625; *Bates* v. *Townley* (1848), 2 Exch. 152, 156, 157; *Tarbuck* v. *Bispham* (1836), 2 M. & W. 2). An arbitrator's award is not evidence of an account stated, as the arbitrator is not the agent of the parties (*Bates* v. *Townley*, *supra*).

(*g*) *Per* Lord ESHER, M.R., in *Grundy* v. *Townsend* (1888), 36 W. R. 531, C. A. Bringing an action is sufficient acceptance (S. C.; and *Chisman* v. *Count* (1841), 2 Man. & G. 307). An order of court without any independent agreement would not be sufficient (*Porter* v. *Cooper* (1834), 1 Cr. M. & R. 387, 395).

(*h*) *Rose* v. *Savory* (1835), 2 Bing. (N. C.) 145; *Hunter* v. *Belcher* (1864), 2 De G. J. & Sm. 194, C. A.; *Mozeley* v. *Cowie* (1877), 47 L. J. (CH.) 271.

(*i*) *Perry* v. *Attwood* (1856), 6 E. & B. 691 (the account was pleaded by way of defence); *Stainton* v. *Carron Co.* (1857), 24 Beav. 346; *Dails* v. *Lloyd* (1848), 12 Q. B. 531.

(*j*) *Thomas* v. *Hawkes* (1841), 8 M. & W. 140; *Dails* v. *Lloyd*, *supra*; *Miller* v. *Douglas* (1886), 56 L. J. (CH.) 91; and see *Vagliano Brothers* v. *Bank of England* (*Governor and Company*) (1888), 22 Q. B. D. 103, at p. 127.

(*k*) *Williamson* v. *Barbour* (1877), 9 Ch. D. 529; *Watson* v. *Rodwell* (1879), 11 Ch. D. 150, C. A.; *Beaumont* v. *Boultbee* (1802), 7 Ves. 599; *Coleman* v. *Mellersh* (1850), 2 Mac. & G. 309; *Ward* v. *Sharp* (1884), 53 L. J. (CH.) 313; *Clarke* v. *Tipping* (1846), 9 Beav. 284; *Lewes* v. *Morgan* (1817), 5 Price, 42; *Hardwicke* (*Earl*) v. *Vernon* (1808), 14 Ves. 504; *Jones* v. *Moffett* (1846), 3 Jo. & Lat. 636; *Walsham* v. *Stainton* (1863), 12 W. R. 63.

(*l*) *Atkinson* v. *Woodhall* (1862), 1 H. & C. 170; *Wayman* v. *Hilliard* (1830), 7 Bing. 101.

(*m*) *Tucker* v. *Barrow* (1828), 7 B. & C. 623.

(*n*) *Roper* v. *Holland* (1835), 3 Ad. & El. 99; *Topham* v. *Morecraft* (1858), 8 E. & B. 972, 983; *Howard* v. *Brownhill* (1853), 23 L. J. (Q. B.) 23; see also *Bond* v. *Nurse* (1847), 10 Q. B. 244.

(*o*) *Howard* v. *Brownhill*, *supra*. See also *Prouting* v. *Hammond* (1819), 8 Taunt. 688.

necessary that the defendant should have been liable upon the original contract giving rise to the debt (*p*).

Statute-barred debts.

995. An acknowledgment constituting an account stated may in certain cases be sued upon, although the original contract in respect of which the acknowledgment is made is incapable of being sued upon. Thus, where certain items of the plaintiff's claim are barred by the Statute of Limitations (*q*) and the defendant has a cross claim, and on going through the account a balance is struck in favour of the plaintiff, this final account amounts to an agreement to set off the statute-barred items against the items due to the defendant, and, a new consideration having arisen by virtue of the set-off and agreement as to the balance due, the plaintiff can sue upon the account stated, though he could not have recovered the whole original debt (*r*).

So, again, where the plaintiff's original claim is unenforceable by reason of the Statute of Frauds (*s*) he may nevertheless recover on an account stated upon a subsequent admission of liability by the defendant (*t*), and where a defendant by stating an account admits the right of the plaintiff to sue in a certain capacity (in which capacity the plaintiff could not have recovered in an action on the original contract) he may be estopped from afterwards denying the plaintiff's right to sue in that capacity on the account so stated (*u*). But a claim on a contract which is void by reason of illegality or immorality or as being contrary to public policy cannot validly be made the subject of an account stated (*v*); nor

Illegal contract.

(*p*) *Wagstaffe* v. *Boardman* (1827), 9 Dow. & Ry. (K. B.) 248; *Peacock* v. *Harris* (1808), 10 East, 104; *Perry* v. *Slade* (1845), 8 Q. B. 115; *Barker* v. *Birt* (1842), 10 M. & W. 61. Therefore the indorsee of a bill may sue the indorser, and it is no defence that the defendant was not an original party to the debt (*Wagstaffe* v. *Boardman*, *supra*); but such indorsement is only *primâ facie* evidence of liability and may be rebutted by proof that the bill was not indorsed with the intention of contracting, but only for the purpose of transferring the bill (*Burmester* v. *Hogarth* (1843), 11 M. & W. 97, 101).

(*q*) *E.g.*, the Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3.

(*r*) Nor does the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), have any application, for a new contract has arisen (*Ashby* v. *James* (1843), 11 M. & W. 542; *Smith* v. *Forty* (1829), 4 C. & P. 126; *Irving* v. *Veitch* (1837), 3 M. & W. 90, 109, 110; and see *Perry* v. *Slade* (1845), 8 Q. B. 115, and *Dawson* v. *Remnant* (1806), 6 Esp. 24). But there must be a new consideration; a mere parol acknowledgment of an existing but statute-barred debt is not sufficient (*Jones* v. *Ryder* (1838), 4 M. & W. 32; *Tarbuck* v. *Bispham* (1836), 2 M. & W. 2, 8; and see *Hopkins* v. *Logan* (1839), 5 M. & W. 241); any new consideration which would support a contract is sufficient (see *Yates* v. *Gardiner* (1851), 20 L. J. (EX.) 327); see also *Purdon* v. *Purdon* (1842), 10 M. & W. 562, and *Perry* v. *Slade* (1845), 8 Q. B. 115).

(*s*) 29 Car. 2, c. 3.

(*t*) *Knowles* v. *Michel* (1811), 13 East, 249; *Pinchon* v. *Chilcott* (1827), 3 C. & P. 236; *Seago* v. *Deane* (1827), 4 Bing. 459; *Cocking* v. *Ward* (1845), 1 C. B. 858. But see *Falmouth* (*Earl*) v. *Thomas* (1832), 1 Cr. & M. 89, at p. 110, and the distinction there drawn between an executed and an executory consideration for the new contract.

(*u*) *Peacock* v. *Harris* (1808), 10 East, 104.

(*v*) *Kennedy* v. *Broun* (1863), 13 C. B. (N. S.) 677; see *Rose* v. *Savory* (1835), 2 Bing. (N. C.) 145.

SECT. 5. Account stated.

Bill of costs.

can a solicitor by suing in this form of action evade the provisions of an Act of Parliament which requires the delivery of a signed bill of costs, or the taxation thereof (*x*); but if there are cross demands between a solicitor and client, the one for costs and the other for goods supplied or work done, and on an adjustment of the accounts a balance is struck in favour of the solicitor, he may sue on the account so stated, although he may not have delivered a bill of costs (*y*). An action on an account stated does not lie against an infant (*z*).

Infant.

Legal obligation necessary.

996. In order to maintain an action on an account stated there must be a debt due to the plaintiff (*a*). An admission founded on the mistaken belief that a debt is due does not enable the action to be brought (*b*), and an acknowledgment that a sum is due in respect of what is proved to be only a moral obligation for which there has been no valuable consideration will not avail (*c*).

Thus, an I.O.U. is *primâ facie* evidence to support an account stated (*d*), but if it is proved that no debt is due the action cannot be maintained (*e*). A promise to pay an overdue bill (*f*), or the giving of a promissory note on which an action cannot be brought (*g*), may be relied on as *primâ facie* evidence to support an account stated; but a promissory note or bill of exchange which is not duly

(*x*) *Scadding* v. *Eyles* (1846), 9 Q. B. 858; *Brooks* v. *Bockett* (1847), 9 Q. B. 847; *Bridgman* v. *Dean* (1852), 7 Exch. 199.

(*y*) *Turner* v. *Willis*, [1905] 1 K. B. 468. And see title SOLICITORS.

(*z*) *Trueman* v. *Hurst* (1785), 1 Term Rep. 40; Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1.

(*a*) *Lemere* v. *Elliott* (1861), 6 H. & N. 656; *Petch* v. *Lyon* (1846), 9 Q. B. 147; *Burgh* v. *Legge* (1839), 5 M. & W. 418; *Tucker* v. *Barrow* (1828), 7 B. & C. 623. An agreement to give a cheque is not sufficient (*Lubbock* v. *Tribe* (1838), 3 M. & W. 607, 614); a promise to pay a sum of money as due is only *primâ facie* evidence of the account (*Lubbock* v. *Tribe*, *supra*; *Whitehead* v. *Howard* (1820), 5 Moore (C. P.), 105, 115). Compare *Peacock* v. *Harris* (1808), 10 East, 104.

(*b*) *Gough* v. *Findon* (1851), 7 Exch. 48; *Thomas* v. *Hawkes* (1841), 8 M. & W. 140; and see *Daniell* v. *Sinclair* (1881), 6 App. Cas. 181, P. C.

(*c*) *French* v. *French* (1841), 3 Scott (N. R.), 121; *Jones* v. *Tanner* (1827), 7 B. & C. 542. See, however, *Laycock* v. *Pickles* (1863), 4 B. & S. 497, where BLACKBURN, J., at p. 506, doubted whether a moral obligation would not be sufficient to support an account stated.

(*d*) *Payne* v. *Jenkins* (1830), 4 C. & P. 324; *Fesenmayer* v. *Adcock* (1847), 16 M. & W. 449; *Buck* v. *Hurst and Bailey* (1866), L. R. 1 C. P. 297; even though not addressed to any person by name (*Curtis* v. *Rickards* (1840), 1 Scott (N. R.), 105; *Douglas* v. *Holme* (1840), 12 Ad. & El. 641).

(*e*) *Lemere* v. *Elliott* (1861), 6 H. & N. 656; *Wilson* v. *Wilson* (1854), 14 C. B. 616 (in the last case there had been a failure of consideration between the giving of the I.O.U. and the action); *Jacobs* v. *Fisher* (1845), 1 C. B. 178.

(*f*) *Oliver* v. *Dovatt* (1839), 2 Mood. & R. 230.

(*g*) *Gould* v. *Coombs* (1845), 1 C. B. 543; *Davies* v. *Wilkinson* (1839), 10 Ad. & El. 98; *Wheatley* v. *Williams* (1836), 1 M. & W. 533 (a note payable at a future date; such note evidence of account stated, on which action may be brought up to six years from date on which note falls due—*i.e.*, the Statute of Limitations does not begin to run till the maturity of the note; see also *Fryer* v. *Roe* (1852), 12 C. B. 437).

stamped may not be looked at for the collateral purpose of proving an account stated (*h*).

997. Though the original debt in respect of which an account is stated need not be enforceable at law in order that an action on the account stated should be maintainable (*i*), it must be a debt between the plaintiff and the defendant, so that where a defendant verbally promises to answer for the debt of a third person, and on such third person making default repeats his promise, the second promise cannot be sued on as an account stated, since it is merely an acknowledgment of a collateral liability, and not of a debt between the parties (*k*).

Must be debt between parties.

998. As a general rule an account stated must refer to past transactions, but it is not strictly necessary that at the time when the account is stated the contract in respect of which the account arises should be wholly executed, provided it is treated as executed; for example, the account may include the price at which one party has agreed to sell land to the other, if such price is treated as one of the items and the balance supposes it to have been actually paid (*l*). The account must, however, have reference to past transactions, so that where the assignees of an insolvent tenant agreed to pay the landlord a sum of money by way of rent it was held that this form of action would not lie, the agreement being a special agreement upon a separate contract, having no reference to transactions which had gone before (*m*).

Must refer to past transactions

Nor is the mere ascertainment of how much remains due under an original agreement (without any new liability arising or consideration passing) necessarily an account stated (*n*).

999. An agent rendering an account is bound thereby, unless he can show it was made by mistake (*o*).

Account stated by agent.

SECT. 6.—*Foreign Judgments.*

1000. Where a court of competent jurisdiction adjudicates a certain sum to be due from one person to another an implied contract to pay such sum arises on the part of the person adjudged liable. It is upon this principle that the judgments of foreign and

Foreign judgment.

(*h*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14; *Jones* v. *Ryder* (1838), 4 M. & W. 32; *Green* v. *Davies* (1825), 4 B. & C. 235, 242; *Jardine* v. *Payne* (1831), 1 B. & Ad. 663; and see *Ashling* v. *Boon*, [1891] 1 Ch. 568. See Part IX., p. 529, *post*.

(*i*) See p. 489, *ante*.

(*k*) *Marshall* v. *Wilson* (1866), 14 W. R. 699, Ex. Ch. (Ir.).

(*l*) *Laycock* v. *Pickles* (1863), 4 B. & S. 497.

(*m*) *Clarke* v. *Webb* (1834), 1 Cr. M. & R. 29.

(*n*) *Middleditch* v. *Ellis* (1848), 2 Exch. 623, 628. But where in substance there is a new transaction, other matters outside the original agreement being taken into account, or a new consideration passing (such as the dissolution of a partnership), then any balance found due from one party to the other may be the foundation of an account stated (*Foster* v. *Allanson* (1788), 2 Term Rep. 479, explained in *Middleditch* v. *Ellis*, *supra*; *Perry* v. *Attwood* (1856), 25 L. J. (Q. B.) 408, where the items were all on one side).

(*o*) *Shaw* v. *Picton* (1825), 4 B. & C. 715, 729; *Cave* v. *Mills* (1862), 7 H. & N. 913.

SET. 6. Foreign Judgments.

colonial courts are enforced in this country (*p*). This matter is fully treated elsewhere (*q*).

SECT. 7.—*Statutory Debts.*

Statutory debts.

1001. Where an Act of Parliament creates an obligation on any person to pay a sum of money to any other person, the amount due can be recovered as a debt by action where no other remedy is provided and where no provision to the contrary is contained in the Act (*a*). But where an Act creates an obligation, and provides a specific method for enforcing that obligation, as a general rule that method is the only one by which performance can be compelled (*b*). It is, however, a question of construction in each case whether the remedy is so limited by the Act or not (*c*).

Such a statutory debt is generally one of specialty to the extent that twenty years instead of six is the period of limitation for actions in respect thereof (*d*).

Part VII.—Assignment of Contracts.

SECT. 1.—*In General.*

Assignment.

1002. Assignment of a contract takes place when the liabilities imposed or the rights acquired thereunder are transferred to a person who was not a party to the original contract. Such assignment may be made either by act of the parties or by operation of law.

By act of parties.

1003. Assignment by act of the parties may be an assignment either of rights or of liabilities under a contract; or, as it is sometimes

(*p*) *Hamilton* v. *Dutch East India Co.* (1732), 8 Bro. Parl. Cas. 264; *Williams* v. *Jones* (1845), 13 M. & W. 628, at p. 633; *Philpott* v. *Adams* (1862), 7 H. & N. 888; *Harris* v. *Saunders* (1825), 4 B. & C. 411. The principle appears most clearly in the judgments of BLACKBURN, J., in *Schibsby* v. *Westenholz* (1870), L. R. 6 Q. B. 155, and of FRY, J., in *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351. See also *Sydney Municipal Council* v. *Bull*, [1909] 1 K. B. 7. An action on a judgment is in the nature of an action of debt, and the claim may be specially indorsed on the writ with a view to proceedings under Order 14 (*Hodsoll* v. *Baxter* (1858), E. B. & E. 884, Ex. Ch.; *Grant* v. *Easton* (1883), 13 Q. B. D. 302, C. A.). As to suing on English, Scottish, and Irish judgments, and the extension of such judgments, see title CONFLICT OF LAWS, Vol. VI., pp. 291 *et seq.*; and as to the effect of a foreign judgment as an estoppel, see title JUDGMENT.

(*q*) See title CONFLICT OF LAWS, Vol. VI., pp. 281 *et seq.*

(*a*) *Shepherd* v. *Hills* (1855), 11 Exch. 55; *Richardson* v. *Willis* (1873), L. R. 8 Exch. 69; *Lloyd* v. *Burrup* (1868), L. R. 4 Exch. 63.

(*b*) *Doe* d. *Rochester* (*Bishop*) v. *Bridges* (1831), 1 B. & Ad. 847, at p. 859; *Pasmore* v. *Oswaldtwistle Urban Council*, [1898] A. C. 387.

(*c*) *London School Board* v. *Wright* (1884), 12 Q. B. D. 578, C. A.; *Bentley* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, [1891] 3 Ch. 222; see also *Pulsford* v. *Devenish*, [1903] 2 Ch. 625; *Groves* v. *Wimborne* (*Lord*), [1898] 2 Q. B. 402; and title STATUTES.

(*d*) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3; *Jones* v. *Pope* (1666), 1 Wms. Saund. 34; *Shepherd* v. *Hills*, *supra*; *Cork and Bandon Rail. Co.* v. *Goode* (1853), 13 C. B. 826. As to the application of this principle to calls or shares, see title COMPANIES, Vol. V.; and as to penalties, see title DAMAGES.

SECT. 1. In General.

expressed, an assignment of the benefit, or an assignment of the burden of the contract. Certain rights, however, are wholly incapable of assignment. Assignment of the rights arising under a contract may be further divided into assignments at common law, in equity, and under statute (*e*).

SECT. 2.—*Assignment of Liabilities by Act of the Parties.*

Assignment of liabilities.

1004. As a general rule a party to a contract cannot assign his liability thereunder without the other party's consent (*f*). This rule applies both at law and in equity (*g*), and is unaffected by statute (*h*), but exceptions to its application are found in connection with certain contracts relating to land (*i*), and where the liability assigned is not connected with the skill, character, credit, or other personal qualifications of the assignor (*j*). Even in the excepted cases the assignment of liability without the consent of the other party to the contract does not discharge the original contracting party without performance, but gives an option to the other party to look to either the assignor or assignee for performance of the contract (*k*).

By consent of all parties, however, liability under a contract may be transferred so as to discharge the original contracting party, provided that certain conditions are fulfilled. Such a transfer of liability constitutes, in reality, a new contract, and, strictly, is not an assignment at all (*l*).

SECT. 3.—*Assignment of Rights by Act of the Parties.*

SUB-SECT. 1.—*At Common Law.*

Assignment of rights.

1005. The common law leaned against assignments of rights as well as assignments of liabilities, and as a general rule a person to

(*e*) See *infra*. Reference may also be made to title CHOSES IN ACTION, Vol. IV., p. 359, where the subject generally is fully treated. As to the position of strangers to contract, see p. 342, *ante*.

(*f*) *Robson* v. *Drummond* (1831), 2 B. & Ad. 303. "You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract" (*Humble* v. *Hunter* (1848), 12 Q. B. 310, at p. 317); see also *Johnson* v. *Raylton* (1881), 7 Q. B. D. 438, C. A.

(*g*) *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Associated Portland Cement Manufacturers* (1900) v. *Tolhurst*, [1902] 2 K. B. 660, at pp. 668 and 677, C. A.; affirmed [1903] A. C. 414.

(*h*) *E.g.*, s. 25 (6) of the Judicature Act, 1873 (36 & 37 Vict. c. 66) (see last cited case as reported [1902] 2 K. B. at pp. 670, 676).

(*i*) See p. 504, *post*.

(*j*) Where a waggon company let a number of railway waggons to the defendants at an annual rent, and agreed to keep them in repair, it was held that the company's assignees were equally competent to keep the waggons in repair, and that the assignment of the company's liability did not put an end to the contract (*British Waggon Co.* v. *Lea* (1880), 5 Q. B. D. 149). See p. 410, *ante*.

(*k*) See p. 506, *post*, and *British Waggon Co.* v. *Lea*, *supra*.

(*l*) See p. 505, *post*. But on a contract for the sale of goods a condition cannot run with or be attached to the goods so as to bind a purchaser without express agreement on his part, and that whether he purchases with or without notice of the condition (*Taddy & Co.* v. *Sterious & Co.*, [1904] 1 Ch. 354; *McGruther* v. *Pitcher*, [1904] 2 Ch. 306).

SECT. 3. Assignment of Rights by Act of the Parties.

whom rights were assigned could not sue in his own name upon the original contract (*m*).

Exceptions, however, existed in the cases of assignments of negotiable instruments, by the law merchant (*n*); of assignments of certain contracts relating to land (*o*); of assignments by the Crown (*p*); and, lastly, of assignments with the consent of the other contracting party (*q*).

At common law.

SUB-SECT. 2.—*In Equity.*

In equity.

1006. In equity an assignment of rights under a contract was regarded as equivalent to an agreement by the assignor to allow the assignee to use his name for the assertion of those rights, and the court would compel the assignor to allow his name to be used for that purpose upon receiving an indemnity against costs (*r*), and would restrain him from suing for his own benefit (*s*). It was in all cases necessary that the assignor should be made a party to the action (*t*). The debtor was not entitled to claim any indemnity from the assignee(*a*). and the assignee could not give him a valid discharge for the debt unless expressly empowered to do so by the instrument of assignment.

Though an assignee may now under certain conditions (*b*) sue in his own name in a court of law, his rights of action, even in a court of law, are largely controlled by the rules governing equitable

(*m*) *Jones* v. *Carter* (1845), 8 Q. B. 134; *Boulton* v. *Jones* (1857), 2 H. & N. 564; *Schmaling* v. *Thomlinson* (1815), 6 Taunt. 147. See *Master* v. *Miller* (1791), 4 Term Rep. 320, at p. 340.

(*n*) See title BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 459.

(*o*) See p. 504, *post*.

(*p*) *Per* BULLER, J., in *Master* v. *Miller* (1791), 4 Term Rep. 320, at p. 340; *Stafford* (*Earl*) v. *Buckley* (1750), 2 Ves. Sen. 171, 181; *Miles* v. *Williams* (1714), 1 P. Wms. 249, 252, 253.

(*q*) See p. 505, *post*.

(*r*) *Torkington* v. *Magee*, [1902] 2 K. B. 427, 432; reversed on the facts [1903] 1 K. B. 644, C. A.; *Crouch* v. *Crédit Foncier of England* (1873), L. R. 8 Q. B. 374, 380; *De Pothonier* v. *De Mattos* (1858), E. B. & E. 461, 467; *Ashley* v. *Ashley* (1829), 3 Sim. 149, 151; *Master* v. *Miller* (1791), 4 Term Rep. 320, 340, 1 Smith, L. C., 11th ed., 767, 789. This does not conflict with Ord. 16, r. 11, of the Rules of the Supreme Court (see *Tryon* v. *National Provident Institution* (1886), 16 Q. B. D. 678, *per* A. L. SMITH, J., at. p. 680). If the debtor after notice of assignment paid the assignor and took a release from him, he could not plead these facts as against the assignee suing in the assignor's name even in a court of law (*Legh* v. *Legh* (1799), 1 Bos. & P. 447), and the assignor was liable to the assignee if he "derogated from his grant" by hindering the assignee from obtaining the benefit of the assignment (*Aulton* v. *Atkins* (1856), 18 C. B. 249; *Gerard* v. *Lewis* (1867), L. R. 2 C. P. 305). The assignee of a debt could not sue for it in equity unless the assignor refused to allow the assignee to use his name in a court of law, or other special circumstances existed (*Hammond* v. *Messenger* (1838), 9 Sim. 327; *Hoskins* v. *Holland* (1875), 44 L. J. (CH.) 273; *Roxburghe* v. *Cox* (1881), 17 Ch. D. 520, 526, C. A.). For further illustrations of the old law, see notes to *Forth* v. *Stanton* (1668), 1 Wms. Saund. 220.

(*s*) *Jeffs* v. *Day* (1866), L. R. 1 Q. B. 372.

(*t*) In order to bind him and prevent him suing at law, and also to enable him to dispute the assignment if he thought fit (*Durham Brothers* v. *Robertson*, [1898] 1 Q. B. 765, 769, 770, C. A.).

(*a*) *Jones* v. *Farrell* (1857), 1 De G. & J. 208, C. A.

(*b*) See p. 500, *post*.

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Assignment of Rights by Act of the Parties.

assignments (*c*); and, moreover, there still remain a number of cases in which he can only sue under the rules prevailing in equity.

Equitable assignment.

1007. An equitable assignment does not require either a deed or writing for its validity (*d*), and no particular form of words is necessary (*e*).

Modes of assignment.

1008. Assignment of a debt due under a contract may be effected in two ways, which have different legal consequences (*f*): (1) The assignor may direct the debtor to pay the assignee. In this case he has merely given a revocable mandate, and no equitable assignment is effected until the debtor has appropriated money for payment and communicated his assent to the assignee or has promised to pay the assignee (*g*). (2) The assignor may give to the assignee an order upon his (the assignor's) debtor to pay a sum to the assignee out of a particular fund or sum due to the assignor. On communication of such order to the debtor a valid equitable assignment is effected, to which the consent of the debtor is not necessary (*h*). The order must constitute a direction, not merely a suggestion or an authority (*i*); it must also be directed to the assignor's debtor

(*c*) *E.g.*, the assignment is subject to equities available against the assignor at the time when notice of the assignment is given (*Roxburghe* v. *Cox* (1881), 17 Ch. D. 520, C. A.; *Webb* v. *Smith* (1885), 30 Ch. D. 192, C. A., and the equitable rule of priority by notice prevails though the form of notice required is different. See title CHOSES IN ACTION, Vol. IV., p. 374.

(*d*) *Lambe* v. *Orton* (1860), 1 Drew. & Sm. 125; *Howell* v. *MacIvers* (1792), 4 Term Rep. 690; *Heath* v. *Hall* (1812), 4 Taunt. 326; *Lett* v. *Morris* (1831), 4 Sim. 607; *Tibbits* v. *George* (1836), 5 Ad. & El. 107, 115. If, however, the assignment comes within the Statute of Frauds, *e.g.*, an assignment of an interest in land, it must be in writing (*Re Whitting, Ex parte Hall* (1879), 10 Ch. D. 615, C. A.).

(*e*) *Chowne* v. *Baylis* (1862), 31 Beav. 351, 360; *Row* v. *Dawson* (1749), 1 Ves. Sen. 331; *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128, 134, C. A.; *Re Griffin, Griffin* v. *Griffin*, [1899] 1 Ch. 408, 412. But the giving of a bill of exchange or other negotiable instrument does not of itself operate as an equitable assignment of funds in the hands of the drawee or of a debt due from him (*Shand* v. *Du Buisson* (1874), L. R. 18 Eq. 283; *Schroeder* v. *Central Bank of London* (1876), 34 L. T. 735 (cheque on banker); *Hopkinson* v. *Forster* (1874), L. R. 19 Eq. 74; *Moore* v. *Bushell* (1857), 27 L. J. (EX.) 3).

(*f*) See *Morrell* v. *Wootten* (1852), 16 Beav. 197, 202, 203.

(*g*) *Moore* v. *Bushell* (1857), 27 L. J. (EX.) 3; *Hill* v. *Royds* (1869), L. R. 8 Eq. 290; *Williams* v. *Everett* (1811), 14 East, 582, 598; *Johnson* v. *Robarts* (1875), 10 Ch. App. 505; *Howell* v. *Batt* (1833), 2 Nev. & M. (K. B.) 381; *Malcolm* v. *Scott* (1850), 5 Exch. 601; *Wedlake* v. *Hurley* (1830), 1 Cr. & J. 83; *Bell* v. *London and North Western Rail. Co.* (1852), 15 Beav. 548; *Gibson* v. *Minet* (1824), 9 Moore (C. P.), 31; and see *Scott* v. *Porcher* (1817), 3 Mer. 652. It is not sufficient for the assignor to inform the assignee that he has given directions to the third person to pay the assignee (*Re Holmes, Ex parte Heywood* (1815), 2 Rose, 355).

(*h*) *Lett* v. *Morris* (1831), 4 Sim. 607; *Row* v. *Dawson* (1749), 1 Ves. Sen. 331; *Burn* v. *Carvalho* (1839), 4 My. & Cr. 690, 702; *Re Row, Ex parte South* (1818), 3 Swan. 392; *Yeates* v. *Groves* (1791), 1 Ves. 280; *Re Whitting, Ex parte Hall* (1879), 10 Ch. D. 615, C. A.; *Webb* v. *Smith* (1885), 30 Ch. D. 192, C. A.; *Greenway* v. *Atkinson* (1881), 29 W. R. 560, C. A.; and see *Rodick* v. *Gandell* (1852), 1 De G. M. & G. 763, 772, 777, and *Morrell* v. *Wootten, supra*; *Alexander* v. *Steinhardt, Walker & Co.*, [1903] 2 K. B. 208; *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C. 454; *Shaw & Co.* v. *Moss Empires, Ltd., and Bastow* (1908), 25 T. L. R. 190.

(*i*) *Watson* v. *Wellington* (*Duke*) (1830), 1 Russ. & M. 602; *Best* v. *Argles* (1834), 2 Cr. & M. 394.

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and not to some third person, so that where an intending assignor wrote to the solicitors of a railway company requesting them to pay to the intended assignee all moneys due from the company to the former, and the solicitors promised the intended assignee to pay such moneys on receiving them, it was held that no equitable assignment of the debt had been effected (*k*).

Incomplete assignment.

1009. An equitable assignment may be either complete or incomplete. It is said to be complete when the assignor has done everything which is capable of being done, according to the nature of the property, to complete the title of the assignee (*l*), and in such case the assignment will be enforced by the court (*m*). When the assignment remains incomplete, then, if the assignee has given value therefor, the court will enforce it, treating the incomplete assignment as an agreement for value to assign; but if the assignee is a volunteer, the court will not assist him (*n*), subject, however, to the two following exceptions or *quasi*-exceptions (*o*): (1) in case of a declaration of trust; (2) in case of a *donatio mortis causa*, in which cases the court will assist the assignee even though he is only a volunteer.

Declaration of trust.

1010. Declarations of trust and *donationes mortis causa* only concern the present title in so far as the subject-matter of either of them may be the assignment of a right which the assignor possesses under a contract.

Where a declaration of trust can be inferred assignment is not

(*k*) *Rodick* v. *Gandell* (1852), 1 De G. M. & G. 763. For equitable assignments generally, what amounts thereto, the requirements as to notice, and the effect of assignment, see title CHOSES IN ACTION, Vol. IV., p. 374.

(*l*) *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264, 274, C. A.; *Donaldson* v. *Donaldson* (1854), Kay, 711; *Re Patrick, Bills* v. *Tatham*, [1891] 1 Ch. 82, C. A.; *Fortescue* v. *Barnett* (1834), 3 My. & K. 36; *Johnstone* v. *Mappin* (1891), 60 L. J. (CH.) 241; and see *Kekewich* v. *Manning* (1851), 1 De G. M. & G. 176, C. A.; *Harding* v. *Harding* (1886), 17 Q. B. D. 442, 444; and *Meek* v. *Kettlewell* (1842), 1 Hare, 464. The fact that notice has not been given to the debtor, though it may enable a third person to obtain a better title than the assignee, does not render the assignment incomplete (*Re Patrick, Bills* v. *Tatham, supra; Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch. D. 128, C. A.).

(*m*) *Harding* v. *Harding, supra*; *Fortescue* v. *Barnett* (1834), 3 My. & K. 36.

(*n*) *Meek* v. *Kettlewell, supra; Harding* v. *Harding, supra; Colman* v. *Sarrel* (1789), 1 Ves. 50, 54; *Ellison* v. *Ellison* (1802), 6 Ves. 656; *Antrobus* v. *Smith* (1805), 12 Ves. 39; *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140; *Edwards* v. *Jones* (1836), 1 My. & Cr. 226; *Trimmer* v. *Danby* (1856), 25 L. J. (CH.) 424; *Re Ellenborough, Towry Law* v. *Burne*, [1903] 1 Ch. 697; and see *Re Whitting, Ex parte Hall* (1878), 10 Ch. D. 615, C. A., and cases cited in judgment in *M'Fadden* v. *Jenkyns* (1842), 1 Hare, 458.

(*o*) It is doubtful whether the two following exceptions are exceptions at all. As to a declaration of trust, it has been said that a declaration of trust may perhaps be treated as a complete transaction in itself, rather than as an exception to the general rule (*M'Fadden* v. *Jenkyns* (1842), 1 Hare, 458, 462); and as to a *donatio mortis causa* it has been said that after the donor's death his legal personal representative becomes a trustee for the donee (*Re Beaumont, Beaumont* v. *Ewbank*, [1902] 1 Ch. 889, 893), so that the second exception is really an illustration of the first.

necessary, but an incomplete assignment will not operate as a declaration of trust (*p*).

A *donatio mortis causa* or gift made in expectation of death, and taking effect only if the donor (*i.e.*, assignor) dies, may be effected without the use of words referring to his death or recovery, provided the intention is sufficiently indicated by the surrounding circumstances (*q*).

Donatio mortis causa.

1011. The assignment of a debt may perhaps imply the assignment of the securities therefor (*r*); on the other hand, securities may be assigned with the intention of assigning a debt, but without the necessary formalities for the assignment of the debt, and in such case, though the assignee cannot recover the debt, yet neither the assignor nor his representatives can recover the securities, and the result may be that no one can recover the debt (*s*).

Assignment of security.

The benefit of a policy of fire insurance does not, in the absence of an express agreement to which the insurance company is a party, pass to the purchaser of the insured house, so that if a house is burnt down after a contract has been made for its purchase, and either before or after completion of the contract, the loss falls on the purchaser (*t*).

Fire insurance policy.

1012. For purposes of stamp duty the distinction between an equitable assignment and a bill of exchange is often a narrow one. On the one hand, an order for the payment of a debt "now due or that may hereafter become due in respect of" work being done by the assignor (*a*), and an order in the following form, "I hereby authorise you to pay B. £365, being the amount of my contract, B. having advanced me that sum" (*b*), have been held to be equitable assignments, and not orders for payment of money (*c*); on the other hand, where the real nature of the transaction is an order

Stamp duty.

(*p*) *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264, 274, C. A. Writing is not necessary (*M'Fadden* v. *Jenkyns* (1842), 1 Hare, 458, 461). As to what constitutes a declaration of trust, see title TRUSTS AND TRUSTEES, and the following cases: *Morgan* v. *Malleson* (1870), L. R. 10 Eq. 475; *Ex parte Pye*, *Ex parte Dubost* (1811), 18 Ves. 140; *Fletcher* v. *Fletcher* (1844), 4 Hare, 67; *Ellison* v. *Ellison* (1802), 6 Ves. 656; *Paterson* v. *Murphy* (1853), 11 Hare, 88; *Bridge* v. *Bridge* (1852), 16 Beav. 315; *Richardson* v. *Richardson* (1867), L. R. 3 Eq. 686, and cases there cited; *Re Breton's Estate*, *Breton* v. *Woollven* (1881), 17 Ch. D. 416; *Warriner* v. *Rogers* (1873), L. R. 16 Eq. 340; *Richards* v. *Delbridge* (1874), L. R. 18 Eq. 11; *Heartley* v. *Nicholson* (1875), L. R. 19 Eq. 233; *Parker* v. *Stones* (1868), 38 L. J. (CH.) 46; *Moore* v. *Moore* (1874), L. R. 18 Eq. 474.

(*q*) *Edwards* v. *Jones* (1836), 1 My. & Cr. 226, and cases cited in judgment. Writing is not necessary, and the fact that the transaction is in writing even tends to rebut the presumption that the gift is intended to operate as a *donatio mortis causa* (*ibid.*, p. 235). As to *donationes mortis causa* generally, see title GIFTS.

(*r*) *Re Patrick*, *Bills* v. *Tatham*, [1891] 1 Ch. 82, 87, C. A.

(*s*) *Rummens* v. *Hare* (1876), 1 Ex. D. 169, C. A.; *Searle* v. *Law* (1846), 15 Sim. 95; *Barton* v. *Gainer* (1858), 3 H. & N. 387.

(*t*) *Poole* v. *Adams* (1864), 33 L. J. (CH.) 639. See title INSURANCE.

(*a*) *Buck* v. *Robson* (1878), 3 Q. B. D. 686.

(*b*) *Diplock* v. *Hammond* (1854), 2 Sm. & G. 141.

(*c*) See also *Crowfoot* v. *Gurney* (1832), 2 Moo. & S. 473; and *Hutchinson* v. *Heyworth* (1838), 9 Ad. & El. 375, and cases there cited.

SECT. 3. Assignment of Rights by Act of the Parties.

for the payment of money out of a particular fund, the order constitutes a bill of exchange, and if not properly stamped is inadmissible, even on payment of a penalty (*d*).

SUB-SECT. 3.—*By Statute.*

Assignment by statute.

1013. The benefit of various contracts of particular kinds has been made assignable at law by a number of different statutes (*e*).

Assignment under any of these statutes must be made strictly in the manner provided by the statute. Thus, notice of an assignment of a policy of life assurance must be given in writing, and must contain the date and purport of the assignment and be given at the principal place of business of the assurance company (*f*). A notice of an agreement to assign upon request is not a notice of assignment within the meaning of the Act (*g*).

Judicature Act, 1873.

1014. A party to a contract may now assign his right in respect of any debt or legal chose in action (*h*) by an absolute assignment in writing (not purporting to be only a charge), of which express notice in writing shall have been given to the person against whom he would have been entitled to claim; and upon such assignment being made, all legal rights and remedies of the assignor pass (subject to any equities which would have prevailed in equity over

(*d*) *Re Adams, Ex parte Shellard* (1873), L. R. 17 Eq. 109; *Pott* v. *Lomas* (1861), 6 H. & N. 529; and see *Griffin* v. *Weatherby* (1868), L. R. 3 Q. B. 753; *London Clearing Bankers (Committee)* v. *Inland Revenue Commissioners*, [1896] 1 Q. B. 542, C. A.; *Ashling* v. *Boon*, [1891] 1 Ch. 568; and see title BILLS OF EXCHANGE, Vol. II., p. 576.

(*e*) An Act for the more effectual securing the payment of rents etc., 11 Geo. 2, c. 19, s. 23, assignment of replevin bonds (repealed by the Statute Law Revision and Civil Procedure Act, 1881 (44 & 45 Vict. c. 59); an Act for the amendment of the Law, and the better advancement of Justice, 4 & 5 Ann. c. 3 (4 Ann. c. 16 in Ruffhead), s. 20, assignment of bail bonds (repealed Statute Law Revision Act, 1871 (34 & 35 Vict. c. 116)) (see now Bail Bonds Act, 1808 (48 Geo. 3, c. 58), s. 3); East India Company Bonds Act, 1811 (51 Geo. 3, c. 64), s. 4, assignment of India bonds; for assignment of shares in companies, see *Vertue* v. *East Anglian Rails. Co.* (1850), 5 Exch. 280; and title COMPANIES, Vol. V.; Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1, assignment of bills of lading; Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 83, assignment of administration bonds; Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 50, assignment of marine policies; Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), assignment of life policies; National Debt Act, 1870 (33 & 34 Vict. c. 71), transfers of stock, s. 22—25. The sale of shares in a joint stock banking company is void unless the contract sets out the numbers of the shares as stated in the company's register (30 & 31 Vict. c. 29). See also title CHOSES IN ACTION, Vol. IV., p. 393.

(*f*) Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), s. 3.

(*g*) *Spencer* v. *Clarke* (1878), 9 Ch. D. 137. *A fortiori*, a notice of deposit of a policy without any agreement to assign is not notice of an assignment (*Crossley* v. *City of Glasgow Life Assurance Co.* (1876), 4 Ch. D. 421). See also Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 50, and *Pellas* v. *Neptune Marine Insurance Co.* (1879), 5 C. P. D. 34, C. A., which was decided under the slightly different wording of the Policies of Marine Assurance Act, 1868 (31 & 32 Vict. c. 86), s. 1, repealed by Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 92, Sched. II.

(*h*) *I.e.*, any debt or chose in action which was formerly assignable only in equity (*Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Associated Portland Cement Manufacturers* (1900) v. *Tolhurst*, [1902] 2 K. B. 660, C. A., at pp. 668 and 676).

the assignee's rights at the time when he received notice of the assignment) from the assignor to the assignee, who is entitled to sue in his own name to enforce any such rights without joining the assignor (*i*).

SUB-SECT. 4.—*Rights incapable of assignment.*

1015. The following rights are incapable of assignment:—

Rights incapable of assignment.

(1) A right under a contract cannot be assigned in any case where the effect of the assignment would be to impose a greater liability on the other party to the contract (*k*).

Prohibited by statute.

(2) A right under contract cannot be assigned when the power to assign it is expressly or impliedly taken away by Act of Parliament. Thus a policy effected under the Friendly Societies Acts, 1875 and 1896(*l*), is not assignable otherwise than as provided by those Acts (*m*), and deferred pay of an officer or soldier cannot be assigned (*n*).

Against public policy.

(3) Even if there is no statutory prohibition, an assignment may be void as being against public policy (*o*). On this principle the assignment of the salary of a public office, or an office in some way connected with the public service, is void; as, for example, the assignment of the salary of a clerk of the peace (*p*), or of an assistant parliamentary counsel to the Treasury (*q*), or of the pay of a navy surgeon (*o*), or of pay given to the assignor to hold himself ready for service of the Crown (*q*).

Champerty and maintenance.

(4) An assignment of a right of action which offends against the law relating to champerty and maintenance is void, equally at law

(*i*) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6). For which see title CHOSES IN ACTION, Vol. IV., p. 367, note (*h*); and see under that title for the law as to what assignments of contracts are within the Act, the requirements of a valid assignment, the necessity for notice, and the priorities as between successive assignees, and the effect generally of such an assignment upon the rights of the parties. The fact that a contract is assigned as a security does not necessarily prevent the assignment from being an absolute assignment (*Russell & Co., Ltd.* v. *Austin Fryers* (1909), 25 T. L. R. 414).

(*k*) *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), [1903] A. C. 414, *per* Lord LINDLEY, at p. 423; see *Dawson* v. *Great Northern and City Rail. Co.*, [1905] 1 K. B. 260, 272, C. A. As to assignment of an agreement for a lease and specific performance in favour of the assignee, see *Crosbie* v. *Tooke* (1833), 1 My. & K. 431; *Morgan* v. *Rhodes* (1834), 1 My. & K. 435; *Weatherall* v. *Geering* (1806), 12 Ves. 504.

(*l*) 38 & 39 Vict. c. 60; 59 & 60 Vict. c. 25.

(*m*) See s. 15 (3) of the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), and s. 56 of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25); and *Re Redman, Warton* v. *Redman*, [1901] 2 Ch. 471.

(*n*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 141; *Crowe* v. *Price* (1889), 22 Q. B. D. 429, C. A.; *Lucas* v. *Harris* (1886), 18 Q. B. D. 127, C. A. For other examples of express or implied prohibition, see *Gathercole* v. *Smith* (1881), 7 Q. B. D. 626, C. A. (under Incumbents Resignation Act, 1871 (34 & 35 Vict. c. 44); *Watkins* v. *Watkins*, [1896] P. 222, C. A., and cases there cited.

(*o*) *Apthorpe* v. *Apthorpe* (1887), 12 P. D. 192, C. A. For general principles, see *Grenfell* v. *Windsor* (*Dean and Canons*) (1840), 2 Beav. 544; see also *Aston* v. *Gwinnell* (1829), 3 Y. & J. 136, 148, 149, Ex. Ch. in Eq., and *Re Huggins, Ex parte Huggins* (1882), 21 Ch. D. 85, C. A. The assignment of the salary of a chaplain to a workhouse (*Re Mirams*, [1891] 1 Q. B. 594) and of the emoluments of a fellow of a Cambridge college (*Feistel* v. *King's College, Cambridge* (1847), 10 Beav. 491) are both valid. See also p. 394, *ante*.

(*p*) *Palmer* v. *Bate* (1821), 2 Brod. & Bing. 673.

(*q*) *Cooper* v. *Reilly* (1829), 2 Sim. 560.

SECT. 3. **Assignment of Rights by Act of the Parties.**

and in equity (*r*), and the assignment of a debt which cannot be enforced by reason of the Gaming Acts confers no better right on the assignee than the assignor had (*s*).

(5) A right under a purely personal contract cannot be assigned (*t*), but moneys due under a contract of personal service may be assigned, notwithstanding that a contract for personal service is not assignable (*u*).

Personal contracts.

(6) It appears also that the parties to a contract may effectively agree that no rights under the contract shall be assigned (*a*).

SECT. 4.—*Assignment by Operation of Law.*

SUB-SECT. 1.—*In General.*

Assignment by operation of law.

1016. The rights and liabilities of either party to a contract may under certain circumstances be assigned by operation of law when such party dies, or becomes bankrupt, or (in the case of a woman) marries. In the case of contracts relating to land, certain rights and liabilities are also in certain cases assigned by operation of law upon the transfer of the land or of the reversion therein (*b*).

SUB-SECT. 2.—*On Death.*

Death.

1017. If the contract is a personal contract, *i.e.*, dependent upon the personal skill or qualifications of one of the parties, and that party dies, the contract is discharged, and no rights or liabilities thereunder in respect of future performance pass to his representatives (*c*). These latter are entitled, however, to sue for any money actually earned by the deceased under the contract and accrued due during his lifetime (*d*), or even for remuneration accruing due after

(*r*) *Dawson* v. *Great Northern and City Rail. Co.*, [1905] 1 K. B. 260, 270, C. A.; and see title ACTION, Vol. I., pp. 51—55.

(*s*) *Re Deerhurst, Ex parte Seaton* (1891), 60 L. J. (Q. B.) 411, 413.

(*t*) *Kemp* v. *Baerselman*, [1906] 2 K. B. 604, C. A.; *Davies* v. *Davies* (1887), 36 Ch. D. 359, 394, C. A.; *Stevens* v. *Benning* (1855), 6 De G. M. & G. 223, C. A.; *Hole* v. *Bradbury* (1879), 12 Ch. D. 886; *Griffith* v. *Tower Publishing Co., Ltd. and Moncrieff*, [1897] 1 Ch. 21; and see *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), [1902] 2 K. B. 660, C. A., at pp. 668, 669; *Crosbie* v. *Tooke* (1833), 1 My. & K. 431; *Morgan* v. *Rhodes* (1834), 1 My. & K. 435. See also p. 410, *ante*. As to contracts of agency, see title AGENCY, Vol. I., p. 195. As to building contracts, see title BUILDING CONTRACTS, Vol. III., p. 275.

(*u*) *Russell & Co., Ltd.* v. *Austin Fryers* (1909), 25 T. L. R. 414.

(*a*) See *Re Turcan* (1888), 40 Ch. D. 5, at p. 10, C. A.; *Brice* v. *Bannister* (1878), 3 Q. B. D. 569, C. A., *per* BRAMWELL, L.J., at p. 581; and *Weatherall* v. *Geering* (1806), 12 Ves. 504.

(*b*) For assignment on death, see title EXECUTORS AND ADMINISTRATORS; on marriage, see title HUSBAND AND WIFE; on bankruptcy, see title BANKRUPTCY AND INSOLVENCY, Vol. II., p. 162; and on transfer of lease or reversion, see titles LANDLORD AND TENANT and REAL PROPERTY AND CHATTELS REAL, and, generally, title CHOSES IN ACTION, Vol. IV., p. 399.

(*c*) *Chamberlain* v. *Williamson* (1814), 2 M. & S. 408; *Finlay* v. *Chirney* (1888), 20 Q. B. D. 494, C. A.; *Phillips* v. *Alhambra Palace Co.*, [1901] 1 K. B. 59, 63; *Shipman* v. *Thompson* (1738), Willes, 104, n.; *Farrow* v. *Wilson* (1869), L. R. 4 C. P. 744; *Phillips* v. *Jones* (1888), 4 T. L. R. 401; *Blades* v. *Free* (1829), 9 B. & C. 167; *Foster* v. *Bates* (1843), 12 M. & W. 226; *Campanari* v. *Woodburn* (1854), 15 C. B. 400; *Friend* v. *Young*, [1897] 2 Ch. 421; *Pool* v. *Pool* (1889), 58 L. J. (P.) 67; *Tasker* v. *Shepherd* (1861), 6 H. & N. 575.

(*d*) *Stubbs* v. *Holywell Rail. Co.* (1867), L. R. 2 Exch. 311.

SECT. 4. Assignment by Operation of Law.

his death if it appears to have been the intention of the parties that remuneration should continue payable after the termination of the contract (*e*).

If the contract is not of a personal nature, and is executory, the personal representative may complete it and demand the price (*f*), or, conversely, may be sued on the contract (*g*).

If a party to a contract assigns his rights in equity during his life, his personal representatives continue to represent him for the purpose of joining or being joined with the assignee in suing the debtor (*h*).

SUB-SECT. 3.—*On Marriage.*

Wife's ante-nuptial debts.

1018. A husband is liable, to the extent of any property acquired through his wife, on his wife's ante-nuptial contracts and obligations, but the wife also remains liable thereon in respect and to the extent of her separate property (*i*).

SUB-SECT. 4.—*On Lunacy.*

Lunacy.

1019. Neither the rights nor liabilities of a party to a contract are assigned by his subsequent insanity or lunacy. Judgment may be recovered against him (*j*), and he may sue on the contract, either by his next friend or committee, as the case may be (*k*).

SUB-SECT. 5.—*On Bankruptcy.*

Bankruptcy.

1020. On the bankruptcy of a party to a personal contract the bankrupt's rights and liabilities thereunder do not in general pass to his trustee (*l*), though in certain cases the trustee may recover damages for breach of such a contract (*m*). If the contract is not of a personal nature, the bankrupt's rights and liabilities thereunder devolve on his trustee, subject to the trustee's right to disclaim onerous contracts (*n*).

The bankrupt, however, may enter into a contract after his bankruptcy, and sue thereon, if the trustee does not intervene (*o*);

(*e*) *Wilson* v. *Harper*, [1908] 2 Ch. 370; and see *Robey* v. *Arnold* (1897), 14 T. L. R. 39; *Salomon* v. *Brownfield* (1896), 12 T. L. R. 239; *Bilbee* v. *Hasse* (1889), 5 T. L. R. 677; and compare *Nayler* v. *Yearsley* (1860), 2 F. & F. 41; *Boyd* v. *Mathers* (1893), 9 T. L. R. 443, C. A.; *Morris* v. *Hunt* (1896), 12 T. L. R. 187; *Geraghty* v. *Baines* (1903), 19 T. L. R. 554, and *Knight* v. *Burgess* (1864), 33 L. J. (CH.) 727.

(*f*) *Marshall* v. *Broadhurst* (1831), 1 Cr. & J. 403; and see *Siboni* v. *Kirkman* (1836), 1 M. & W. 418, 422, 423.

(*g*) *Wentworth* v. *Cock* (1839), 10 Ad. & El. 42; *Cooper* v. *Jarman* (1866), L. R. 3 Eq. 98; and see *Collinson* v. *Lister* (1855), 20 Beav. 356.

(*h*) *Brandt* v. *Heatig* (1818), 2 Moore (C. P.), 184; and see title EXECUTORS AND ADMINISTRATORS.

(*i*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 13, 14; and see title HUSBAND AND WIFE.

(*j*) See *Re Leavesley*, [1891] 2 Ch. 1, C. A.

(*k*) See *Farnham* v. *Milward & Co.*, [1895] 2 Ch. 730, 735. The effects of subsequent lunacy relate mainly to the procedure to be employed for enforcing the lunatic's contract; see title LUNATICS AND PERSONS OF UNSOUND MIND.

(*l*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., at p. 162.

(*m*) *Ibid.*, pp. 138, 139.

(*n*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55; Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 13.

(*o*) See title BANKRUPTCY AND INSOLVENCY, Vol. II., at pp. 139, 164 *et seq.*

SECT. 4. Assignment by Operation of Law.

and the bankrupt cannot be deprived without an order of the court of any part of a salary or income to which he is entitled (*p*).

SUB-SECT. 6.—*Covenants which run with the Land.*

Covenants running with the land.

1021. On the assignment by a tenant of a leasehold interest in land certain rights and liabilities pass to the assignee by operation of law, he being entitled to sue or liable to be sued by reason of the privity of estate between him and the landlord (*q*). When the benefit or burden of a covenant by the landlord, or by the tenant assigning, as the case may be, passes to the assignee of the tenant, such covenant is said to "run with the land." The rule is that covenants which "touch and concern" the land (*r*) run with the land wherever the covenantor has in terms covenanted for himself and his assigns. Where, however, he has not expressly covenanted for his assigns, the benefit or burden of the covenant does not pass to the assignee of the term, unless it is also concerned with something which was in existence at the time when the covenant was made (*s*).

Running with reversion.

1022. A covenant is said to "run with the reversion" when the benefit or burden of it, as the case may be, passes to an assignee of the lessor. Generally speaking, all covenants relating to the subject-matter of the demise run with the reversion (*t*).

Personal covenants.

1023. Covenants which do not run with the land or with the reversion are called collateral or personal covenants (*u*).

Freeholds.

1024. On an assignment of freeholds the benefit of covenants entered into with the assignor in relation to the land as a general rule passes to the assignee, but the obligation of performing positive covenants entered into by the assignor does not pass to the assignee by virtue of the assignment, there being no privity of contract or estate between the assignee and covenantee (*x*).

Restrictive covenants.

1025. The obligation of observing all covenants restrictive of the user of land demised passes in equity to any assignee or underlessee of the land, whether he takes with notice of the covenants or

(*p*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53.

(*q*) The assignee is only liable or entitled to sue so long as the term remains vested in him, and on the other hand the assignor if he is the original lessee remains liable notwithstanding the assignment on all his own covenants. An underlessee is not, as such, liable to the head lessor for performance of the lessee's covenants. See title LANDLORD AND TENANT.

(*r*) *E.g.*, to pay rent or do repairs or a covenant by the landlord for quiet enjoyment.

(*s*) These rules are known as the rules in *Spencer's Case* (1583), 5 Co. Rep. 16; see 1 Smith, L. C., 11th ed., 55. See also *Forster* v. *Elvet Colliery Co., Ltd.*, [1908] 1 K. B. 629, C. A.; affirmed H. L., [1908] W. N. 250; 78 L. J. (CH.) 246.

(*t*) See stat. 32 Hen. 8, c. 34, and the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), ss. 10—12; *Elliston* v. *Reacher*, [1908] 2 Ch. 665, C. A.; and for a treatment of the subject in detail, titles EQUITY; LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL.

(*u*) *I.e.*, limited to the person, but not in this case by reason of any special skill or qualifications; *e.g.*, to renew worn-out chattels, or deliver up stock.

(*x*) See titles EQUITY; REAL PROPERTY AND CHATTELS REAL. On the sale of goods no condition attaches to or runs with the goods except by express agreement; see note (*l*) on p. 495, *ante*.

not (*a*) ; but an assignee of a freehold interest is only bound to observe restrictive covenants of which he has actual or constructive notice at the time of the assignment, and this obligation is only an equitable one (*b*).

SECT. 4. Assignment by Operation of Law.

SECT. 5.—*Novation.*

1026. Novation is a form of assignment in which, by the consent of all parties, a new contract is substituted for an existing contract. Usually, but not necessarily (*c*), a new person becomes party to the new contract, and some person who was party to the old contract is discharged from further liability. The introduction of a new party prevents the new contract from being a mere accord without satisfaction (*d*), and thus affords a defence to any action upon the old contract (*e*).

Novation.

For novation to ensue there must be not only the substitution of some other obligation for the original one, but also the intention or *animus novandi* (*f*).

A common form of novation occurs where A. is indebted to B., and C. is indebted to A., and all three parties mutually agree that C. shall become B.'s debtor in place of A. Certain conditions must, however, be fulfilled in order to enable B. to sue C. upon such an agreement. These conditions are—(1) that the intermediate debt of A. to B. should be extinguished (*g*); (2) that the same or a larger amount should be due from C. to A. than from A. to B. (*h*) ; and (3) that a defined and ascertained amount should be transferred (*i*). It is not,

(*a*) *Thornewell* v. *Johnson* (1881), 50 L. J. (CH.) 641 ; *Holloway Brothers* v. *Hill*, [1902] 2 Ch. 612. The origin of the obligation is the doctrine of notice, actual or constructive, but as every assignee or underlessee of leaseholds is deemed to have at least constructive notice of all restrictive covenants affecting the land demised, the question of notice is really immaterial. The modern legislation precluding a proposed purchaser or underlessee from calling for the title to the freehold or leasehold reversion, in the absence of an express condition giving him that right, has made no difference in this respect. See for further authority and details, titles EQUITY; LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL.

(*b*) See *Tulk* v. *Moxhay* (1848), 2 Ph. 774 ; *Formby* v. *Barker*, [1903] 2 Ch. 539, C. A. ; and titles EQUITY; REAL PROPERTY AND CHATTELS REAL.

(*c*) *Scarf* v. *Jardine* (1882), 7 App. Cas. 345, *per* Lord SELBORNE, L.C., at p. 351.

(*d*) The commonest example of novation occurs where, on the dissolution of partnership, the former partners who continue to carry on the business release the retiring partner from liability for the firm's debts and give notice to a creditor, who accepts the liability of the new firm in place of that of the old. See following cases and Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 17. For the case of an agent agreeing to hold money of his principal for his principal's creditor, sometimes described as a species of novation, see p. 475, *ante*.

(*e*) *Henderson* v. *Stobart* (1850), 5 Exch. 99.

(*f*) *Wilson* v. *Lloyd* (1873), L. R. 16 Eq. 60, at p. 74.

(*g*) *Cuxon* v. *Chadley* (1824), 3 B. & C. 591 ; *Liversidge* v. *Broadbent* (1859), 4 H. & N. 603 ; *Cochrane* v. *Green* (1860), 9 C. B. (N. S.) 448 ; *Wharton* v. *Walker* (1825), 4 B. & C. 163, following and explaining *Wilson* v. *Coupland* (1821), 5 B. & Ald. 228 ; *Tatlock* v. *Harris* (1789), 3 Term Rep. 174, *per* BULLER, J., at p. 180 ; see also *Israel* v. *Douglas* (1789), 1 Hy. Bl. 239 ; *Hodgson* v. *Anderson* (1825), 3 B. & C. 842 ; *Lacy* v. *M'Neile* (1824), 4 Dow. & Ry. (K. B.) 7.

(*h*) *Fairlie* v. *Denton* (1828), 8 B. & C. 395 ; *Crowfoot* v. *Gurney* (1832), 9 Bing. 372.

(*i*) See cases cited in note (*h*), *supra*.

SECT. 5. **Novation.**

however, necessary that such amount should be either ascertained or due at the moment of the agreement to transfer the debt, if it is subsequently ascertained and due before the original party has suffered any change of status (*k*).

Consent.

1027. Since novation is a new contract, it is essential that the consent of all parties shall be obtained (*l*), and in this necessity for consent lies the essential difference between novation and assignment (*m*).

Implied consent.

Such consent may be inferred from conduct without express words. Thus a company, by registering a transfer of shares, agrees to discharge the contract with the old shareholder and accept the new one in his stead (*n*). So, again, the consent of a creditor to a transfer of liability from an old to a new firm may be inferred from the fact that he continues to deal with the new firm after notice of the change of partners (*o*). Slight acts of recognition of the existence of the new firm which are not incompatible with a determination to continue to look solely to the old firm as responsible for the debt are not, however, sufficient to constitute novation (*p*).

(*k*) *Crowfoot* v. *Gurney* (1832), 9 Bing. 372; *Pooley* v. *Goodwin* (1835), 4 Ad. & El. 94. The subsequent bankruptcy of the original creditor will not affect the defendant's liability (*Crowfoot* v. *Gurney*, *supra*).

(*l*) *Wilson* v. *Coupland* (1821), 5 B. & Ald. 228, 232; *Wharton* v. *Walker* (1825); 6 Dow. & Ry. (K. B.) 288; see also *Parker* v. *Wise* (1817), 6 M. & S. 239; *Thomas* v. *Shillibeer* (1836), 1 M. & W. 124.

(*m*) Thus, no agreement between retiring and new partners made without the consent of a creditor can relieve the old firm from liability, or prevent such creditor from suing the members of the old firm with whom he contracted (*Kirwan* v. *Kirwan* (1834), 2 Cr. & M. 617; and see Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 17, 36); but if he once elects to look to the new firm novation is effected, and he can no longer treat the old partners as liable (*Scarf* v. *Jardine* (1882), 7 App. Cas. 345). For the case of a creditor electing to look to the old firm, see *British Homes Assurance Corporation, Ltd.* v. *Paterson*, [1902] 2 Ch. 404). And conversely if a debtor agrees with a third person that such third person shall pay his debt, a creditor who has been no party to the agreement cannot sue the third person (*Price* v. *Easton* (1833), 4 B. & Ad. 433); but the creditor may consent to look to a new party as assignee in place of the party with whom he originally contracted, and such consent is binding on him though given after the assignment has been made (*Oldfield* v. *Lowe* (1829), 9 B. & C. 73). See also title PARTNERSHIP.

(*n*) Subject, of course, to its statutory rights available against past shareholders (*Re Towns Drainage and Sewage Utilization Co., Morton's Case* (1873), L. R. 16 Eq. 104).

(*o*) *Bilborough* v. *Holmes* (1876), 5 Ch. D. 255; *Hart* v. *Alexander* (1837), 2 M. & W. 484 (knowledge is sufficient without direct notice, *per* PARKE, B., at p. 489); *Rolfe and the Bank of Australasia* v. *Flower, Salting & Co.* (1866), L. R. 1 P. C. 27, at pp. 44, 45. But it is otherwise where a new partner is taken into the firm and the creditor shows a clear intention of continuing his business with the old partners alone (see *British Homes Assurance Corporation, Ltd.* v. *Paterson*, [1902] 2 Ch. 404). Stronger evidence is required to prove consent to a transfer of liability where the creditor relies upon a written instrument (*Re Family Endowment Society* (1870), 5 Ch. App. 118, 132). As to the effect of publishing such notice in a newspaper, see *Graham* v. *Hope* (1793), Peake, 208; *Jenkins* v. *Blizard* (1816), 1 Stark. 418; and Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 36.

(*p*) Thus, where a debt was due from a firm which was subsequently formed into a company, and the creditor wrote that he looked to the firm and knew nothing of the company, but afterwards applied to the company for interest on

Similarly, although a transfer by an insurance company of its business and liabilities is inoperative to bind policy-holders without their consent, such consent may nevertheless be inferred from various acts, a reasonable construction of which indicates an election on the part of a policy-holder to accept the liability of the new company; but the burden of proving consent lies on the person alleging it (*q*).

his debt, the application for interest was held no evidence of an intention to look to the company for payment in place of the original debtor (*Re Smith, Knight & Co., Ex parte Gibson* (1869), 4 Ch. App. 662; *Harris* v. *Farwell* (1851), 15 Beav. 31; and see *Brown* v. *Gordon* (1852), 16 Beav. 302; and *Aspinall* v. *London and North Western Rail. Co.* (1853), 11 Hare, 325). And where a plaintiff who has contracted with a firm receives notice that a new partner has been taken into the firm, but, ignoring such notice, continues to carry on business relating to such contract with the individual or individuals of whom the firm formerly consisted, he cannot make the new partner liable for a fraud committed by the old members of the firm in respect of the contract (*British Homes Assurance Corporation, Ltd.* v. *Paterson*, [1902] 2 Ch. 404). As to the amount of liability which an incoming partner will be taken to have accepted, it has been held in the case of a banking firm that the new firm is not to be considered (in the absence of proof of an agreement to that effect) as accepting liability for more than that sum which appears due to a customer from the books which are handed over, *i.e.*, the liability of the new firm is the apparent, and not necessarily the actual, balance (*Craufurd* v. *Cox* (1851), 6 Exch. 287). An incoming partner is not liable for work done under an agreement made before he became a partner merely on the ground that the work has been completed and delivered after his accession (*Whitehead* v. *Barron* (1839), 2 Mood. & R. 248). Conversely, a firm of partners cannot by any agreement among themselves, on the accession of a new partner, acquire a right to sue upon a contract to which one of their number was not a party (*Wilsford* v. *Wood* 1794), 1 Esp. 183). Where, however, a contract was made by a firm before the accession of a new partner, but the new partner received part of the benefit of the contract, and after his accession a bill was given by the firm, the new partner was held liable thereon (*Wilson* v. *Bailey, Potter and Lewis* (1840), 9 Dowl. 18). Compare *Bagel* v. *Miller*, [1903] 2 K. B. 212; *Friend* v. *Young*, [1897] 2 Ch. 421. See also title PARTNERSHIP.

(*q*) *Re European Assurance Society, and Re Wellington Reversionary Annuity and Life Assurance Society, Conquest's Case* (1875), 1 Ch. D. 334, C. A., *per* JAMES, L.J., at p. 344. Thus, the mere acceptance of receipts from the new company (*Re Manchester and London Life Assurance and Loan Association* (1870), 5 Ch. App. 640), the sending in of policies (in response to an application) to the new company to be indorsed, followed by a refusal to sign a form assenting to a transfer of liability by the old company (*Re Medical, Invalid and General Life Assurance Society, Griffith's Case* (1871), 6 Ch. App. 374), and the payment of premiums to the new company by direction of the old company without offering any alternative mode of payment, have been held insufficient evidence of consent (*Conquest's Case, supra*); but if a policy is sent to be indorsed, and is returned indorsed by the new company and so accepted, the indorsement will be taken to be in substitution for a new policy and novation is effected (*Re European Assurance Society, Miller's Case* (1876), 3 Ch. D. 391, C. A.; *Re Medical, Invalid and General Life Assurance Society, Griffith's Case* (1871), 6 Ch. App. 374, at p. 380; *Re International Life Assurance Society and Hercules Insurance Co., Ex parte Blood* (1870), L. R. 9 Eq. 316, where the question was whether such indorsement constituted a novation or a guarantee). And so where it was admitted that the policy-holder had notice in fact of the transfer of liability by the insurance company, and nevertheless for thirteen years he continued to pay premiums to and take receipts from the new company, it was held that evidence of consent could be inferred and that novation had been effected (*Re National Provincial Life Assurance Society* (1870), L. R. 9 Eq. 306). In *Re International Life Assurance Society and Hercules Insurance Co., Ex parte Blood* (1870), L. R. 9 Eq. 316, it was doubted whether payment of one premium in such a case without other facts, such as sending the policy for indorsement,

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Consent may also be implied where it appears that an assignment of liability was contemplated by the parties to the original contract as being in accordance with the custom or usages of the particular trade or business (*r*).

Valuable consideration necessary.

1028. In addition to the consent of all parties being obtained, it is necessary that the new contract should comply with all other requirements of an original contract. There must, for example, be valuable consideration; but as a general rule the rescission of the former agreement of itself constitutes sufficient valuable consideration (*s*).

An agreement to accept the liability of one debtor in place of two is not bad for want of valuable consideration, for in various ways the sole liability may be more advantageous (*t*); but an agreement made between the parties to a promissory note for payment of the amount thereof by instalments without the addition of any new party is no defence to a claim upon the original note unless there is some valuable consideration other than the mere agreement to pay the instalments (*u*).

Writing not necessary.

1029. Since novation is a new contract, it follows that it need not be in writing as being a promise to answer for the debt of

would be sufficient evidence of consent to constitute novation; see also *Re European Assurance Society Arbitration Acts and Industrial and General Life Assurance and Deposit Co., Cocker's Case* (1876), 3 Ch. D. 1, C. A. Where a policy-holder accepted a bonus in the new company, to which he was only entitled on the assumption that he was a policy-holder in the new company, his consent was likewise inferred (*Re Medical, Invalid and General Life Assurance Society, Spencer's Case* (1871), 6 Ch. App. 362). These cases, which illustrate the general law on novation, must now, in the particular case of life assurance societies, be read subject to the Life Assurance Companies Act, 1872 (35 & 36 Vict. c. 41), which provides (s. 7) that the policy-holder's consent shall not be implied unless he has signified in writing, signed by him or his agent, his abandonment of his claim against the old company and acceptance of the liability of the new company in substitution; see title INSURANCE. If there is a deed of settlement enabling the company to transfer its business, then novation is effected the moment such transfer is made (*Re European Assurance Society, Hort's Case and Grain's Case*, (1875), 1 Ch. D. 307, C. A.; *Cocker's Case* (1876), 3 Ch. D. 1, C. A.), the consent of the policy-holders being already impliedly given, whether or not the policy is expressed to be subject to the deed of settlement (*Re European Assurance Society, Dowse's Case* (1876), 3 Ch. D. 384, C. A.), unless the words of the deed of settlement reserve the rights of the parties insured (*Re India and London Life Assurance Co.* (1872), 7 Ch. App. 651). In ascertaining the intention of the creditor a distinction is to be drawn between the holder of a policy who continues to pay premiums after the transfer of the business and the grantee of an annuity who merely continues to receive payments (*Re National Provincial Life Assurance Society* (1870), L. R. 9 Eq. 306, at p. 312; *Re India and London Life Assurance Co.* (1872), 7 Ch. App. 651; *Re Family Endowment Society* (1870), 5 Ch. App. 118).

(*r*) As, for instance, a custom for a building owner to transfer his liability to pay the quantity surveyor to the builder whose tender is accepted (*North* v. *Bassett*, [1892] 1 Q. B. 333; see also *Johnson* v. *Raylton* (1881), 7 Q. B. D. 438, C. A., and title BUILDING CONTRACTS ETC., Vol. III., p. 271).

(*s*) See *Foster* v. *Dawber* (1851), 6 Exch. 839, 851; *Goss* v. *Nugent* (*Lord*) (1833), 5 B. & Ad. 58, 65.

(*t*) *Thompson* v. *Percival* (1834), 5 B. & Ad. 925, *per* DENMAN, C.J., at p. 933; *Lyth* v. *Ault* (1852), 7 Exch. 669, explaining *Lodge* v. *Dicas* (1820), 3 B. & Ald. 611.

(*u*) *McManus* v. *Bark* (1870), L. R. 5 Exch. 65.

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another, for the original debt no longer exists (*a*). Similarly, where the original contract was in writing, and before breach thereof a new verbal contract has been entered into in substitution for it, evidence of such new verbal contract may be admitted, for, the old contract being annulled, the new contract does not vary it, even though the new contract may adopt some of the provisions of the old one (*b*).

Contracts of service.

1030. The principle of novation applies to contracts of service as well as to other contracts, so that a servant or agent who agrees to serve a firm for a period of years, but on the dissolution and reconstruction of the firm before the expiration of such period agrees to serve the reconstructed firm in place of the dissolved firm, has no right of action for breach of contract against the dissolved firm (*c*).

Part VIII.—Interpretation of Contracts.

SECT. 1.—*In General.*

Interpretation.

1031. The interpretation of a written document is, generally speaking, a matter of law for the court, and is regulated by certain well-established rules (*d*). The jury, however, must in certain cases (*e*) ascertain as a fact the meaning of the words used in a written contract and also, in order to enable the court to construe the document, the surrounding circumstances of the particular case (*f*). Where the contract is oral or is to be inferred from a series of acts and things done, in the course of which letters are

(*a*) *Browning* v. *Stallard* (1814), 5 Taunt. 450; *Taylor* v. *Hilary* (1835), 1 Cr. M. & R. 741; *Anstey* v. *Marden* (1804), 1 Bos. & P. (N. R.) 124.

(*b*) *Goss* v. *Nugent* (*Lord*) (1833), 5 B. & Ad. 58, 65 (unless, of course, such new agreement is required to be in writing for other reasons, such as the Statute of Frauds).

(*c*) *Hobson* v. *Cowley* (1858), 27 L. J. (EX.) 205; and see *Brace* v. *Calder*, [1895] 2 Q. B. 253, C. A.

(*d*) See p. 510, *post*. See also title DEEDS AND OTHER INSTRUMENTS for the rules as to the construction and interpretation of documents generally.

(*e*) See p. 511, *post*.

(*f*) As to the respective functions of judge and jury, see the following cases: *Neilson* v. *Harford* (1841), 8 M. & W. 806, 823, *per* PARKE, B.; *Bowes* v. *Shand* (1877), 2 App. Cas. 455; *Simpson* v. *Margitson* (1847), 11 Q. B. 23, and cases there cited; *Hutchison* v. *Bowker* (1839), 5 M. & W. 535; *Robey* v. *Arnold* (1898), 14 T. L. R. 220, C. A.; *Key* v. *Cotesworth* (1852), 7 Exch. 595; *Lyle* v. *Richards* (1866), L. R. 1 H. L. 222; *Hills* v. *Evans* (1862), 31 L. J. (CH.) 457; *George D. Emery Co.* v. *Wells*, [1906] A. C. 515, P. C. The rule that the construction of a document is for the court applies equally where the original document is lost and parol evidence is given of its contents (*Berwick* v. *Horsfall* (1858), 4 C. B. (N. S.) 450). It is for the court, and not the jury, to decipher badly-written words (*R.* v. *Hucks* (1816), 1 Stark. 521). Parol evidence may be given of the surrounding circumstances for the purpose of explaining, but not of varying, the words used (*Mumford* v. *Gething* (1859), 7 C. B. (N. S.) 305, 321; *Carr* v. *Montefiore* (1864), 5 B. & S. 408, Ex. Ch.; *Macdonald* v. *Longbottom* (1859), 1 E. & E. 977; and see p. 511, *post*).

SECT. 1. In General.

written, but the contract does not depend solely upon the letters, it is for the jury to say what is the real contract between the parties (*g*).

Thus, usually it is a question of fact for the jury whether an instrument has been delivered as an escrow, but where facts are proved by evidence in writing which is undisputed, as, for example, where a form of contract is sent inclosed in a letter explaining why and on what terms it is sent, the construction of the letter, and the question whether the contract is delivered as an escrow, is for the judge (*h*).

SECT 2.—*Written Contracts.*

Ordinary meaning.

1032. The first general rule of construction of a written contract is that the language of the instrument is to be understood in its ordinary and natural meaning, notwithstanding the fact that such a construction may appear not to carry out the view which it may be supposed the parties intended to carry out (*i*); and evidence may not be received to show that the language was intended to be used by the parties with any other than the ordinary and natural meaning (*k*), for there is no such thing as equitable, as distinct from legal, construction of an agreement, equity in this respect following the law (*l*).

(*g*) *Moore* v. *Garwood* (1849), 4 Exch. 681, 685, 690, Ex. Ch.; *Bolckow* v. *Seymour* (1864), 17 C. B. (N. S.) 107; *Lakeman* v. *Mountstephen* (1874), L. R. 7 H. L. 17; *Gurney* v. *Womersley* (1854), 4 E. & B. 133; *Jones* v. *Littledale* (1837), 6 Ad. & El. 486; *Holding* v. *Elliott* (1860), 5 H. & N. 117; *Long* v. *Millar* (1879), 4 C. P. D. 450, C. A.; *Williamson* v. *Barton* (1862), 7 H. & N. 899.

(*h*) *Furness* v. *Meek* (1857), 27 L. J. (EX.) 34.

(*i*) *Lee* v. *Alexander* (1883), 8 App. Cas. 853, 869, 870; *Grey* v. *Pearson* (1857), 6 H. L. Cas. 61, *per* Lord WENSLEYDALE, at p. 106; *Caledonian Rail. Co.* v. *North British Rail. Co.* (1881), 6 App. Cas. 114, *per* Lord BLACKBURN, at p. 131; *Smith* v. *Cooke*, [1891] A. C. 297, *per* Lord HALSBURY, L.C., at p. 298; *Elliott* v. *Crutchley*, [1906] A. C. 7, *per* Lord HALSBURY, L.C., at p. 9; *Great Western Rail. Co.* (*Directors etc.*) v. *Rous* (1870), L. R. 4 H. L. 650, *per* Lord WESTBURY, at p. 659; *Mallan* v. *May* (1844), 13 M. & W. 511, 517; *Birrell* v. *Dryer* (1884), 9 App. Cas. 345; *Taylor* v. *St. Helens Corporation* (1877), 6 Ch. D. 264, 270, C. A.; *Denaby and Cadeby Main Collieries Co.* v. *Fenton* (1898), 14 T. L. R. 268 (meaning of "fatal accident" in a mine); *Felix Hadley & Co., Ltd.* v. *Hadley*, [1898] 2 Ch. 680 (meaning of "securities" for debts); *Croydon Rural District Council* v. *Sutton District Water Co.* (1907), 71 J. P. 513 ("damage to property caused by or resulting from execution of works"); *Edwardes' Menu Co., Ltd.* v. *Chudleigh* (1897), 14 T. L. R. 64, C. A. (agreement for letting of bars etc. of theatre "so long as it should remain in his hands"); *Wheeler* v. *Fradd* (1898), 14 T. L. R. 302, C. A. (agreement to repay money after company should go to allotment); *Loates* v. *Maple* (1903), 88 L. T. 288 ("fail to procure a licence"); *Shoolbred & Co.* v. *Wyndham* (1908), *Times*, December 1st, 1908 (work to be done to "entire satisfaction" of defendants); *London Music Hall, Ltd.* v. *Austin* (1908), *Times*, December 16th, 1908. See, however, *M'Cowan* v. *Baine*, "*The Niobe*," [1891] A. C. 401, where a ship was interpreted to include the ship's tug, but see special reasons therefor, *per* Lord WATSON, at p. 407; see also *Blore* v. *Guilini*, [1903] 1 K. B. 356, following *Hartshorne* v. *Watson* (1838), 4 Bing. (N. C.) 178, where a reservation of a landlord's right of action under a lease was implied notwithstanding that the contract provided for avoidance (in certain events which had happened) of every clause in the lease; and see p. 511, note (*q*), *post*. See also *Dominion Coal Co., Ltd.* v. *Dominion Iron and Steel Co., Ltd.* (1909), 25 T. L. R. 309, P. C.

(*k*) *Shore* v. *Wilson* (1852), 9 Cl. & Fin. 355, 565, 566, H. L.; *Hitchin* v. *Groom* (1848), 5 C. B. 515; *McClean* v. *Kennard* (1874), 9 Ch. App. 336, 345, 349.

(*l*) *Scott* v. *Liverpool Corporation* (1858), 28 L. J. (CH.) 230, 235; see *Midland*

1033. To this general rule there are two exceptions (*m*)—

Technical words.

(1) Where the jury has found as a fact that certain words, as, for example, words or phrases employed in art, commerce etc., or in a particular locality, have been used in a special technical sense other than their ordinary sense, then the court will construe them in such special technical sense (*n*); and though evidence of a particular custom or usage is not admissible to annex a new term or condition which is inconsistent with or repugnant to the express terms of the instrument (*o*), evidence of such a custom or usage is, nevertheless, admissible to alter the apparent meaning of words and to show that they were intended to be used with reference to the custom or usage in a special sense (*p*). But evidence will not be admitted of any such technical or secondary meaning of words unless the court is satisfied, either from the context or from the circumstances of the case, that the parties did not intend to use the words in their primary or ordinary sense (*q*). In certain cases parol evidence may

Custom.

Great Western Railway of Ireland (*Directors etc.*) v. *Johnson* (1858), 6 H. L. Cas. 798. Equity will not construe a joint contract as joint and several (*Kendall* v. *Hamilton* (1879), 4 App. Cas. 504, 521; see, however, on this point, p. 338, *ante*.

(*m*) See *M'Cowan* v. *Baine*, "*The Niobe*," [1891] A. C. 401, 408.

(*n*) *Mallan* v. *May* (1844), 13 M. & W. 511, 518; *Bold* v. *Rayner* (1836), 1 M. & W. 343; *Studdy* v. *Sanders* (1826), 5 B. & C. 628; *Goblet* v. *Beechey* (1829), 3 Sim. 24; *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355, 555, 556, H. L., and cases there cited; *Robey* v. *Arnold* (1898), 14 T. L. R. 220, C. A. (meaning of "re-engagement" in theatrical agent's contract). Evidence of such usage of words is analogous to translation (*Shore* v. *Wilson*, *supra*; *Grant* v. *Maddox* (1846), 15 M. & W. 737, *per* PLATT, B., at p. 746). As to translations generally, see *Di Sora* v. *Phillipps* (1863), 10 H. L. Cas. 624; *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, C. A.

(*o*) *Abbott* v. *Bates* (1875), 45 L. J. (Q. B.) 117, C. A.; *Bower* v. *Jones* (1831), 8 Bing. 65; *Warde* v. *Stuart* (1856), 1 C. B. (N. S.) 88; *Fullwood* v. *Akerman* (1862), 11 C. B. (N. S.) 737; *Biggs* v. *Gordon* (1860), 8 C. B. (N. S.) 638; *Caine* v. *Horsfall* (1847), 1 Exch. 519; *Parker* v. *Ibbetson* (1858), 4 C. B. (N. S.) 346; *Cruse* v. *Paine* (1869), 4 Ch. App. 441; *Barrow* v. *Dyster* (1884), 13 Q. B. D. 635; *Wright* v. *Zetland* (*Marquis*), [1908] 1 K. B. 63, C. A.

(*p*) *Grant* v. *Maddox* (1846), 15 M. & W. 737, *per* ALDERSON, B., at p. 745 ("years" in a theatrical agreement held to mean portions of years); *Smith* v. *Wilson* (1832), 3 B. & Ad. 728 ("a thousand rabbits" held to mean twelve hundred); see also *Myers* v. *Sarl* (1860), 3 E. & E. 306; *Brown* v. *Byrne* (1854), 3 E. & B. 703, 716; *Norden Steam Co.* v. *Dempsey* (1876), 1 C. P. D. 654; *Kelly* v. *London Pavilion, Ltd.* (1898), 14 T. L. R. 234, C. A.; *Southland Frozen Meat and Produce Export Co.* v. *Nelson Brothers*, [1898] A. C. 442, P. C. (the words "be in any way concerned or interested in the erection or use of any similar works" construed in business sense); *Blow* v. *Lewis* (1902), 19 T. L. R. 127 (the words "when theatrical performances are suspended from any cause whatever" held to refer only to a general closing of theatres); *Hardie* v. *Balmain* (1902), 18 T. L. R. 539, C. A. (similar case); *Cochran & Son* v. *Leckie's Trustee* (1906), 8 F. (Ct. of Sess.) 975 ("all goods held in trust covered by insurance against fire"); *Dawson* v. *Isle*, [1906] 1 Ch. 633 (meaning of "book debt"). See title CUSTOMS AND USAGES.

(*q*) In *Biddlecombe* v. *Bond* (1835), 4 Ad. & El. 332, and *Parker* v. *Gossage* (1835), 2 Cr. M. & R. 617, the court refused to construe the word "insolvency" in a technical sense, there being nothing in the context to justify such a construction. Where a person covenanted not to use a house as a beerhouse, but opened a grocer's shop, where he carried on the sale of beer to be drunk off the premises, evidence to show that "beerhouse" was understood in the trade to include such a shop was rejected (*Holt & Co.* v. *Collyer* (1881), 16 Ch. D. 718; see *Elliott* v. *Turner* (1845), 2 C. B. 446, 461, Ex. Ch.).

SECT. 2. **Written Contracts.**

also be given to explain a latent ambiguity, or to show that the contract was made subject to a condition unexpressed in the writing (*r*).

Context.

(2) Where the context itself shows that words were not intended to be used in their ordinary sense, such words are construed in harmony with the context (*s*), and greater regard is paid to the intention of the parties as appearing from the instrument when construed as a whole than to any particular words they may have used to express their intention (*t*).

Whole contract to be considered.

1034. The whole of the contract must be considered in order to ascertain the meaning of any particular part thereof (*a*). When the contract is to be ascertained from a series of letters or documents the whole of the correspondence must be looked at, and, although two letters in the course of such correspondence may appear to contain a completed contract, the court will not hold the contract to be complete where subsequent letters show that certain terms had not been agreed upon (*b*). But when a contract has in fact been completed and reduced to writing the court is not entitled to consider antecedent acts or correspondence, or to look at words deleted before the conclusion of the contract, in order to ascertain the meaning of the contract in writing finally agreed upon (*c*).

Implied terms.

1035. In construing a contract, a term or condition not expressly stated may, under certain circumstances, be implied by the court (*d*), if it is clear from the nature of the transaction or from something actually found in the document that the contracting parties must have intended such a term or condition to be a part of the agreement between them (*e*). Such an implication must in all cases be

(*r*) See p. 523, *post*, as to the admissibility, generally, of parol evidence to alter or explain a written agreement; also title EVIDENCE.

(*s*) *M'Cowan* v. *Baine*, "*The Niobe*," [1891] A. C. 401, 408.

(*t*) *Ford* v. *Beech* (1848), 11 Q. B. 842, 866.

(*a*) *Barton* v. *Fitzgerald* (1812), 15 East, 530; *Sicklemore* v. *Thistleton* (1817), 6 M. & S. 9; *Elderslie Steamship Co.* v. *Borthwick*, [1905] A. C. 93; *National Provincial Bank of England* v. *Marshall* (1888), 40 Ch. D. 112, C. A.; *Coles* v. *Hulme* (1828), 8 B. & C. 568; *Bickmore* v. *Dimmer*, [1903] 1 Ch. 158, C. A.

(*b*) *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311; see, however, this case explained in *Bolton Partners* v. *Lambert* (1889), 41 Ch. D. 295, at p. 306, C. A.; *Bristol, Cardiff and Swansea Aërated Bread Co.* v. *Maggs* (1890), 44 Ch. D. 616. Where two principals enter into a contract on the face of which no intervention by an agent appears, the court will be slow to import into such contract a condition contained in a covering letter addressed by a principal to the agent of the other party (*Maconchy* v. *Trower*, [1894] 2 I. R. 663, 668, H. L.). See p. 351, *ante*.

(*c*) *Inglis* v. *Buttery* (1878), 3 App. Cas. 552; *Lee* v. *Alexander* (1883), 8 App. Cas. 853. Acts done after an agreement may be material as evidence of facts existing at the time of the agreement, and therefore relevant to its interpretation as part of the surrounding circumstances, but are not admissible to construe the agreement itself (*Monro* v. *Taylor* (1850), 8 Hare, 51, at p. 56).

(*d*) See *Morgan* v. *Ravey* (1861), 6 H. & N. 265, which decided that wherever a relation exists between two parties which involves the performance of certain duties by one of them, and the payment of reward to him by the other, the law will imply, or a jury may infer, a promise by each party to do what is to be done by him; and see *per* Lord ESHER, M.R., in *Ex parte Ford* (1885), 16 Q. B. D. 305, at p. 307.

(*e*) *Midland Rail. Co.* v. *London and North Western Rail. Co.* (1866), 15 L. T. 264; *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q. B. 488, C. A., *per* KAY, L.J., at p. 494 (a continuing contract to sell to the plaintiff all brewer's grains made by

founded on the presumed intention of the parties and upon reason (*f*), and will only be made when it is necessary in order to give the transaction that efficacy that both parties must have intended it to have (*g*), and to prevent such a failure of consideration as could not have been within the contemplation of the parties (*h*). If there is any reasonable doubt whether the parties did intend to enter into such a contract as is sought to be enforced, the document should be looked at and all the surrounding circumstances considered, and if the document is silent and there is no bad faith on the part of the alleged promisee, the court ought to be extremely careful how it implies a term (*i*). It is not enough to say that it would be reasonable to make a particular implication, for a stipulation ought not to be imported into a written contract unless on considering the whole matter in a reasonable manner it is clear that the parties must have intended that there should be the suggested stipulation (*a*). If the contract is effective without the suggested term and is capable of being fulfilled as it stands, an implication ought not to be made (*b*). In every case the question whether an implication ought or ought not to be made will depend on the particular facts, consequently it is neither possible nor desirable to lay down any hard and fast rules on the subject, and it must be remembered that the construction of one contract will afford but little guidance for the construction of another unless the facts and surrounding circumstances are practically identical (*c*).

the defendants did not imply that the defendants would continue in business until the expiration of the term); *Douglas* v. *Baynes* (1908), 78 L. J. (P. C.) 13, at p. 15.

(*f*) *The Moorcock* (1889), 14 P. D. 64, C. A., *per* BOWEN, L.J. at p. 68 (a representation that it was safe for a ship to lie at a wharf imported into a contract for the use of the wharf).

(*g*) *Ibid.*; and see *Lamb* v. *Evans*, [1893] 1 Ch. 218, C. A., *per* BOWEN, L.J., at p. 229. In *Nickoll and Knight* v. *Ashton, Edridge & Co.*, [1901] 2 K. B. 126, C. A., the parties had contracted for the sale and purchase of seed to be shipped by a named ship at a specified date, and it was held that there was no implied warranty that the ship should continue to exist at such date, since the parties must have known that performance of the contract would become impossible unless the ship continued to exist.

(*h*) *The Moorcock, supra.*

(*i*) See *per* KAY, J., in *Re Railway and Electric Appliances Co.* (1888), 38 Ch. D. 597, at p. 608 (on sale of patent to a company, no implied covenant by company to keep the patent alive); *Douglas* v. *Baynes, supra.*

(*a*) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q. B. 488, C. A., *per* Lord ESHER, M.R., at p. 491.

(*b*) *Consolidated Goldfields of South Africa, Ltd.*, v. *Spiegel & Co.* (1909), 25 T. L. R. 275, *per* BRAY, J., at p. 277 (in sale of shares for special settlement, no implied condition that the special settlement should take place within a reasonable time).

(*c*) See *The Moorcock, supra; Hamlyn & Co.* v. *Wood & Co., supra; The Bearn*, [1906] P. 48, C. A. (implied representation that ship could safely berth at wharf). The following cases may be referred to for instances where an implication has been imported into a contract:—*Turner* v. *Goldsmith*, [1891] 1 Q. B. 544, C. A. (where agent employed for term of years on commission, an implication that the principal will do what is necessary to enable the agent to earn his commission. In *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256, where there was held to be no such implication, there was no express contract to employ the agent. Both these cases were considered and explained in *Northey* v. *Trevillion* (1902), 18 T. L. R. 648, in which PHILLIMORE, J., said that if the contract is to employ as an agent merely there is no implied promise to him with the means of earning his commission, but that it is otherwise where the contract is one of service and the commission takes the place of salary); *Robb* v. *Green*, [1895] 2 Q. B. 315, C. A.

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Words importing agreement.

1036. It is a general rule of construction that terms of a written instrument which import that the parties have agreed upon certain things being done have the same effect as express promises, or, in the case of an instrument under seal, covenants, by the respective parties, to do all such things as are necessary to carry out the agreement according to the expressed or manifest intention (*d*). It is

(it is an implied term of a contract of service that the servant will observe good faith towards his master during the existence of the confidential relation between them); *Kirchner* v. *Gruban*, [1909] 1 Ch. 413 (implied term in contract of service not to divulge information obtained); *Baynes & Co.* v. *Lloyd & Sons*, [1895] 2 Q. B. 610, C. A. (covenants for title and quiet enjoyment implied in a sub-lease); *Re Anglesey* (*Marquis*), *Willmot* v. *Gardner*, [1901] 2 Ch. 549, C. A. (an agreement to pay interest may be inferred from the course of dealing between the parties); see also *Stirling* v. *Maitland* (1864), 5 B. & S. 840, where COCKBURN, C.J., at p. 852, said that if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative. For instances where the implication has not been made, see *Churchward* v. *R.* (1865), L. R. 1 Q. B. 173 (contract to carry mails, no implied condition on part of Crown to employ the contractor); *R.* v. *Demers*, [1900] A. C. 103, P. C. (contract to print public documents at a price, no implied promise that orders for work shall be given); *Morell* v. *New London Discount Co., Ltd.* (1902), 18 T. L. R. 507 (agreement to contribute towards cost of building a theatre, no implied promise to build the theatre); *Hardie* v. *Balmain* (1902), 18 T. L. R. 539, C. A. (contract to produce play at certain theatre on certain date, defendant not discharged by reason of theatre being closed for repairs to comply with requirements of county council); *Re Royal Aquarium, Ltd.* (1903), 20 T. L. R. 35 (no implied promise on part of entertainment company to life members that the undertaking should continue to exist). See also *Aspdin* v. *Austin* (1844), 5 Q. B. 671; *Re Chappell*, *Ex parte Ford* (1885), 16 Q. B. D. 305, C. A.; cases cited in note (*d*), *infra*, and the Coronation cases cited on pp. 430, 431, *ante*.

(*d*) *Wood* v. *Copper Miners' Co.* (1849), 7 C. B. 906 (an agreement between A. and B. that A. shall buy certain property from B. imports an undertaking by B. to sell the property to A., *per* WILDE, C.J., at p. 936); *St. Albans* (*Duke*) v. *Ellis* (1812), 16 East, 352 (covenant in lease to plough and cultivate all the premises, except the rabbit warren and sheep walk, in a due course of husbandry, imports a covenant not to plough the rabbit warren or sheep walk); *Payne* v. *Haine* (1847), 16 M. & W. 541 (a covenant by a lessee to keep premises in good repair during the term imports a covenant to put them in good repair if they are in bad repair at the commencement of the term); *Saner* v. *Bilton* (1878), 7 Ch. D. 815 (the same rule applies where the covenant is by the lessor); *M'Intyre* v. *Belcher* (1863), 14 C. B. (N. S.) 654 (a promise by the purchaser of the goodwill of a business in consideration of the transfer to pay a certain proportion of the earnings for a specified period imports a promise to carry on the business during such period and not by any wilful act or default to prevent the receipt of earnings); *Telegraph Despatch and Intelligence Co.* v. *McLean* (1873), 8 Ch. App. 658 (similar case); *Ogdens, Ltd.* v. *Nelson*, [1905] A. C. 109 (agreement to give bonus to customers for a certain period varying with the profits of a business imports a promise to continue the business so that the amount of the bonus can be ascertained); *Williams* v. *Burrell* (1845), 1 C. B. 402 (provision in a lease that the lessor should during the term warrant and defend the lessee against all persons lawfully claiming the premises held equivalent to an express covenant for quiet enjoyment); *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544, C. A. (agreement to employ a person as agent for a specified term, for the sale of goods to be submitted to him by samples from time to time, held to import an obligation to submit samples so as to enable the agent to earn his commission); see also *Emmens* v. *Elderton* (1853), 4 H. L. Cas. 624; *Devonald* v. *Rosser & Sons*, [1906] 2 K. B. 728, C. A.; and compare *Rhodes* v *Forwood* (1876), 1 App. Cas. 256; *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q. B. 488, C. A.; *Morell* v. *New London Discount Co., Ltd.* (1902), 18 T. L. R. 507; *Moon* v. *Camberwell Borough Council*

Recitals.

immaterial whether the words importing the agreement are contained in the recitals or in the operative part of the instrument (*e*), and it is sufficient if the intention of the parties mutually to contract appears from the instrument as a whole (*f*). A recital of agreement will not, however, import a covenant where there is an express covenant relating to the same subject-matter (*g*), unless the express covenant is so ambiguous as to justify a reference to the recitals in order to explain it (*h*). Whether a recital or acknowledgment operates as a contract is a question of construction in each particular case, and depends on what appears to have been the intention of the parties having regard to the terms of the instrument as a whole and the surrounding circumstances (*i*). It is also necessary to distinguish between words importing an agreement and words of mere qualification (*j*).

General words.

1037. General words in a deed will be construed with reference to the recitals, and may be restrained by a particular recital (*k*).

(1903), 68 J. P. 57, C. A.; *Bovine, Ltd.* v. *Dent and Wilkinson* (1904), 21 T. L. R. 82; *Webb* v. *Plummer* (1819), 2 B. & Ald. 746 (a provision in a lease that the tenant should during the term fold his flock of sheep which he should keep on the premises held to import a covenant to keep a flock of sheep on the premises); *Shrewsbury (Earl)* v. *Gould* (1819), 2 B. & Ald. 487 (covenant by lessee at all times and seasons of burning lime to supply the lessor and his tenants with lime at a stipulated price for the improvement of his and their lands etc. held to import a covenant to burn lime at all such seasons); *City of Dublin Steam Packet Co.* v. *R.* (1908), 24 T. L. R. 798, C. A. (contract for the carriage of mails held to import an obligation on the Crown to allow such facilities as were reasonably necessary to enable the contractors to perform their obligations under the contract).

(*e*) *Brooks* v. *Jennings* (1866), L. R. 1 C. P. 476 (a recital in a composition deed that the debtor has agreed to pay a certain composition on his debts was held equivalent to a covenant with each of the creditors to pay such composition); *Farrall* v. *Hilditch* (1859), 5 C. B. (N. S.) 840; *Lay* v. *Mottram* (1865), 19 C. B. (N. S.) 479.

(*f*) *Wood* v. *Copper Miners' Co.* (1849), 7 C. B. 906.

(*g*) *Dawes* v. *Tredwell* (1881), 18 Ch. D. 354, C. A. (recital in marriage settlement of agreement to settle after-acquired property of either husband or wife; covenant by husband alone that if property should be acquired by either he would settle; it was held that no covenant by the wife was implied to settle property acquired by her for her separate use).

(*h*) *Re De Ros' Trust, Hardwicke* v. *Wilmot* (1886), 31 Ch. D. 81 (similar case; but the covenant by the husband was that he and the wife would settle etc.; it was held sufficiently ambiguous to justify a reference to the recitals, and that the wife's property was bound by the covenant).

(*i*) *Courtney* v. *Taylor* (1843), 6 Man. & G. 851; *Farrall* v. *Hilditch* (1859), 5 C. B. (N. S.) 840.

(*j*) *Wolveridge* v. *Steward* (1833), 1 Cr. & M. 644, Ex. Ch. (assignment of lease, subject to the payment of rent and performance of the covenants; held, that the assignee, having assigned over, was not liable for rent the assignor was subsequently compelled to pay, the words "subject to the payment of rent etc." being words of qualification and not of contract). The ordinary provision in the case of a covenant by a tenant not to assign without the consent of the landlord, that the consent shall not be arbitrarily or unreasonably withheld, does not amount to a covenant by the landlord not to refuse his consent arbitrarily or unreasonably, but merely qualifies the covenant of the tenant, and justifies him in assigning without consent if it is arbitrarily or unreasonably withheld (*Treloar* v. *Bigge* (1874), L. R. 9 Exch. 151; *Sear* v. *House Property and Investment Society* (1880), 16 Ch. D. 387); and see *Andrew* v. *Bridgman*, [1908] 1 K. B. 596, C. A.; *Jenkins* v. *Price*, [1908] 1 Ch. 10, C. A.

(*k*) *Danby* v. *Coutts & Co.* (1885), 29 Ch. D. 500; *Payler* v. *Homersham* (1815),

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General words will also be construed with reference to the subject-matter in relation to which they are used and may be limited accordingly (*l*); and the court in construing a written contract is entitled to consider the probability that the parties have used words in a sense given to them by well-known judicial construction (*m*), or that they had certain extrinsic facts appearing from the surrounding circumstances of the particular case in their minds when they entered into the contract (*n*).

Words *ejusdem generis.*

1038. Where general terms follow particular ones it is a well-established rule that such general terms are to be taken as being intended to apply only to those persons and things which are *ejusdem generis* with those comprehended in the particular ones. The most common application of this rule occurs in the construction of policies of insurance, where special enumerated risks are insured against, followed by a general clause insuring against all risks whatsoever, the last clause being construed as limited to risks of the same nature as those previously mentioned (*o*).

Mercantile contracts.

1039. The same rules of construction apply to mercantile contracts and policies of insurance as to other instruments (*p*); and in such a policy the words of a warranty will be construed according to the sense in which they are commonly used by merchants, and not that in which they are used by men of science (*q*).

4 M. & S. 423. Thus, where a bill of sale assigned "all household goods of every kind and description whatsoever in a certain house more particularly mentioned and set forth in an inventory," and the inventory omitted some of the goods, it was held that the operative part of the bill of sale was restricted by the subsequent words (*Wood* v. *Rowcliffe* (1851), 6 Exch. 407). In the case of a policy of life assurance this principle extends to reading the policy and declaration together, so that where a policy provided that the policy should be void if any statement in the declaration was untrue, and the declaration declared that the policy should be void if any statement therein was designedly untrue, the declaration was held to explain the clause in the policy, which could accordingly only be avoided by reason of a designedly untrue statement (*Fowkes* v. *Manchester and London Assurance Association* (1863), 3 B. & S. 917; *Hemmings* v. *Sceptre Life Association, Ltd.*, [1905] 1 Ch. 365). For variations between recitals and operative part of deeds, see title DEEDS AND OTHER INSTRUMENTS.

(*l*) *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484, *per* Lord HALSBURY, L.C., at p. 490; *Lewis* v. *Ramsdale* (1886), 55 L. T. 179; *Harper* v. *Godsell* (1870), L. R. 5 Q. B. 422; *Perry* v. *Holl* (1860), 2 De G. F. & J. 38; *Hogg* v. *Snaith* (1808), 1 Taunt. 347; *Hay* v. *Goldsmidt* (1804), cited 1 Taunt. 349; *Gardner* v. *Baillie* (1796), 6 Term Rep. 591.

(*m*) *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.*, *supra*.

(*n*) *Birrell* v. *Dryer* (1884), 9 App. Cas. 345, 353.

(*o*) *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.*, *supra*; *Lee* v. *Alexander* (1883), 8 App. Cas. 853; *Cullen* v. *Butler* (1816), 5 M. & S. 461; see *Early* v. *Rathbone* (1888), 57 L. J. (CH.) 652; *Crompton* v. *Jarratt* (1885), 30 Ch. D. 298, C. A.; *Lambourn* v. *McLellan*, [1903] 2 Ch. 268, C. A.; and title DEEDS AND OTHER INSTRUMENTS.

(*p*) *Robertson* v. *French* (1803), 4 East, 130, 135; *Carr* v. *Montefiore* (1864), 5 B. & S. 408, Ex. Ch.; *Southwell* v. *Bowditch* (1876), 1 C. P. D. 374, 376, C. A.

(*q*) *Hart* v. *Standard Marine Insurance Co.* (1889), 22 Q. B. D. 499, C. A. (iron held to include steel); *Moody* v. *Surridge* (1794), 2 Esp. 633 (corn to include malt). See title INSURANCE.

Exceptions.

1040. Exceptions in a contract are as a general rule to be construed strictly against the party in whose favour they are inserted (*r*), but in the case of a grant any ambiguity is to be construed strictly against the grantor (*s*).

Correcting errors.

1041. In construing a written contract effect should be given to every word therein which does not appear to have been left in by mistake (*t*), and for the purpose of giving effect to the whole of the document the court may insert stops and parentheses when they are missing (*a*), and may also supply words when it is clear from the instrument itself that they have been omitted by inadvertence (*b*). Similarly, words may be struck out which have obviously been left in by mistake (*c*), or which are immaterial and surplusage (*d*), and misspelling (*e*) and grammatical errors (*f*) may be corrected.

Repugnant condition.

On the same principle a condition which is repugnant to the nature of a grant is void and may be rejected (*g*) ; a proviso wholly

(*r*) *Burton* v. *English* (1883), 12 Q. B. D. 218, 220, 222, C. A. ; *Blackett* v. *Royal Exchange Assurance Co.* (1832), 2 Cr. & J. 244, 251 ; *Taylor* v. *Liverpool and Great Western Steam Co.* (1874), L. R. 9 Q. B. 546. On the ground that those who wish to introduce words in a contract in order to shield themselves ought to do so in clear words. See also *The Pearlmoor*, [1904] P. 286 ; *Elderslie Steamship Co.* v. *Borthwick*, [1905] A. C. 93 ; *Price & Co.* v. *Union Lighterage Co.*, [1904] 1 K. B. 412, C. A. ; *Savill Brothers, Ltd.* v. *Bethell*, [1902] 2 Ch. 523, C. A. ; *Fowkes* v. *Manchester and London Assurance Association* (1863), 3 B. & S. 917 ; *Birrell* v. *Dryer* (1884), 9 App. Cas. 345.

(*s*) *Williams* v. *James* (1867), L. R. 2 C. P. 577, *per* WILLES, J., at p. 581 ; *Neill* v. *Devonshire* (*Duke*) (1882), 8 App. Cas. 135, 149. Great doubt, however, has been thrown on this rule by JESSEL, M.R., in *Taylor* v. *St. Helens Corporation* (1877), 6 Ch. D. 264, C. A. ; but see *Leech* v. *Schweder* (1874), 9 Ch. App. 466, n., *per* JESSEL, M.R. It has been held, too, that a guarantee should be construed strictly against the party executing it (*Hargreave* v. *Smee* (1829), 6 Bing. 244), that conditions of sale should be construed strictly against the vendor (*Seaton* v. *Mapp* (1846), 2 Coll. 556), and that generally speaking, where there are several ways of performing a contract, that mode may be adopted which is least profitable to the person complaining of a breach (*Cockburn* v. *Alexander* (1848), 6 C. B. 791, 814).

(*t*) *Hayne* v. *Cummings* (1864), 16 C. B. (N. S.) 421, 427 ; *Doe* v. *Godwin* (1815), 4 M. & S. 265 ; *Tielens* v. *Hooper* (1850), 5 Exch. 830 ; *Hitchin* v. *Groom* (1848), 5 C. B. 515.

(*a*) *Doe* v. *Martin* (1790), 4 Term Rep. 39, 65, 66.

(*b*) *Coles* v. *Hulme* (1828), 8 B. & C. 568 (the word "pounds" following a figure in the obligatory part of a bond) ; *Phipps* v. *Tanner* (1833), 5 C. & P. 488 ("pounds" inserted in a bill of exchange) ; *Say and Seal's* (*Lord*) *Case* (1711), 10 Mod. Rep. 4 (a proper name) ; *Mourmand* v. *Le Clair*, [1903] 2 K. B. 216 ; *James* v. *Tallent* (1822), 5 B. & Ald. 889 (annuity for support of illegitimate children and their mother during their joint lives : the words "and during the life of the survivor" added) ; *Waugh* v. *Bussell* (1814), 5 Taunt. 707 ("one pound" read as "one hundred pounds") ; and see *Langdon* v. *Goole* (1681), 3 Lev. 21 ; *Wilson* v. *Wilson* (1854), 5 H. L. Cas. 40 ; *Fowkes* v. *Manchester and London Life Assurance Association*, *supra*, *per* BLACKBURN, J., at p. 930.

(*c*) As where a contract is contained in a printed form from which the parties have omitted to strike out words applicable to a larger or different contract (*Dudgeon* v. *Pembroke* (1877), 2 App. Cas. 284 ; and see *Butler* v. *Wigge* (1667), 1 Wms. Saund. 6*i*).

(*d*) *Waugh* v. *Bussell* (1814), 5 Taunt. 707, 711.

(*e*) *Hulbert* v. *Long* (1620), Cro. Jac. 607 ; *Mauleverer* v. *Hawxby* (1670), 2 Saund. 79.

(*f*) *Glen's Trustees* v. *Lancashire and Yorkshire Accident Insurance Co., Ltd.* (1906), 8 F. (Ct. of Sess.) 915 ; *Wells* v. *Wright* (1678), 2 Mod. Rep. 285.

(*g*) *Solly* v. *Forbes* (1820), 2 Brod. & Bing. 38, and cases there cited. Therefore

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Mis-description.

inconsistent with a covenant is void and may be rejected (*h*), and a misdescription may be rejected upon the principle *Falsa demonstratio non nocet.* This maxim, however, only applies to cases where the false demonstration is added to that which was sufficiently certain before (*i*); for where words are inserted which form an essential part of the description of the subject-matter they cannot be rejected (*k*).

In order to give effect to a contract according to what appears to have been the intention of the parties, the court may imply a term or condition or a qualification of a clause which is not inconsistent with the general tenor of the document (*l*), but where the intention of the parties is not sufficiently clear the court will not make a contract for them in order to prevent the whole agreement from being void on the ground of uncertainty or otherwise (*m*).

Uncertainty.

1042. Where the parties have put their agreement into such vague and uncertain language as to be unintelligible, the contract is altogether void (*n*), unless the uncertain part of the agreement can be separated from the substantial part thereof (*o*); but words which are grammatically meaningless may be found by a jury to be used in a mercantile sense and construed accordingly (*p*), and a contract is not necessarily void merely because it is open to more than one construction (*q*).

Ambiguity.

1043. Where words are capable of two meanings the object with which they were inserted may be looked at in order to arrive at the sense in which they were used (*r*), and where one interpretation is

a proviso in a bill of exchange drawn by a joint stock company purporting to restrict its liability is void, as being repugnant to the nature of a bill of exchange (*Re State Fire Insurance Co., Ex parte Meredith's and Convers's Claims* (1863), 32 L. J. (CH.) 300).

(*h*) *Furnivall* v. *Coombes* (1843), 5 Man. & G. 736; but a mere limitation of liability which can be made consistent with the covenant is valid (*Williams* v. *Hathaway* (1877), 6 Ch. D. 544). See *Mildmay's Case* (1584), 1 Co. Rep. 175; see also *Cheshire Lines Committee* v. *Lewis & Co.* (1880), 50 L. J. (Q. B.) 121, C. A.

(*i*) *Roe* d. *Conolly* v. *Vernon and Vyse* (1804), 5 East, 51; *Llewellyn* v. *Jersey* (*Earl*) (1843), 11 M. & W. 183; *Barton* v. *Dawes* (1850), 19 L. J. (C. P.) 302. Many cases of false demonstration have reference to the construction of wills, as to which see title WILLS.

(*k*) *Magee* v. *Lavell* (1874), L. R. 9 C. P. 107; and see *Early* v. *Rathbone* (1888), 57 L. J. (CH.) 652.

(*l*) *The Moorcock* (1889), 14 P. D. 64, 68, C. A.; *Saner* v. *Bilton* (1878), 7 Ch. D. 815; *M'Intyre* v. *Belcher* (1863), 14 C. B. (N. S.) 654. See *Ogdens, Ltd.* v. *Nelson*, [1905] A. C. 109, and p. 512, *ante.*

(*m*) *Mills* v. *Dunham*, [1891] 1 Ch. 576, 580, C. A. This principle has application chiefly to the case of contracts in restraint of trade, which become entirely void where the restraint is greater than the law allows, unless the agreement itself severs the lawful from the unlawful clauses.

(*n*) *Re Vince, Ex parte Baxter*, [1892] 2 Q. B. 478, C. A.; *Taylor* v. *Portington* (1855), 7 De G. M. & G. 328, C. A.; *Pearce* v. *Watts* (1875), L. R. 20 Eq. 492; *Davies* v. *Davies* (1887), 36 Ch. D. 359, C. A.; and see *Taylor* v. *Brewer* (1813), 1 M. & S. 290; *Douglas* v. *Baynes* (1908), 78 L. J. (P. C.) 13.

(*o*) *Guthing* v. *Lynn* (1831), 2 B. & Ad. 232.

(*p*) *Ashforth* v. *Redford* (1873), L. R. 9 C. P. 20.

(*q*) *Per* PARKER, J., in *Wade* v. *Robert Arthur Theatres Co., Ltd.* (1907), 24 T. L. R. 77.

(*r*) *Moody* v. *Surridge* (1794), 2 Esp. 634, explained in *Hart* v. *Standard*

consistent with what appears to have been the intention of the parties and another repugnant to it, the court will give effect to the apparent intention, provided it can do so without violating any of the established rules of construction (*s*). Similarly the court leans to an interpretation which will effectuate rather than one which will invalidate an instrument (*t*), and, in construing two contemporaneous documents, to a construction which will reconcile them rather than one which will render them inconsistent (*u*).

Where two instruments relating to the same matter are executed on the same day, the court may inquire which was executed first, but if an intention appears from the terms of the instruments themselves either that they were to take effect *pari passu* or that one was to take effect in priority to the other, they will be presumed to have been executed in the order necessary to give effect to the manifest intention (*a*).

1044. In the case of a difference between written words and figures the written words as a general rule prevail, and parol evidence is not in such a case admissible to show that there was an omission from the written words (*b*). Where a contract is partly written and partly a printed form, more weight is given to the written than to the printed words where they are inconsistent, because the written words are taken as being intended to qualify the printed form, and because they are the terms selected by the parties themselves for the expression of their meaning, whereas the printed words are a general formula adapted equally to their case and that of all other contracting parties on similar occasions and subjects (*c*). A signature in pencil is as effective as if written in any other manner (*d*).

Difference between words and figures, writing and print.

Pencil signature.

Marine Insurance Co. (1889), 22 Q. B. D. 499, C. A.; *M'Cowan* v. *Baine*, "*The Niobe*," [1891] A. C. 401, 408. The domicil of the parties and place of execution may also become material (*Lansdowne* (*Marchioness*) v. *Lansdowne* (*Marquis*) (1820), 2 Bli. 60, H. L.; see also *Brown* v. *Fletcher* (1876), 35 L. T. 165).

(*s*) *Solly* v. *Forbes* (1820), 2 Brod. & Bing. 38, 48; *Parkhurst* v. *Smith* (1742), Willes, 327, at p. 332; *Hayne* v. *Cummings* (1864), 16 C. B. (N. S.) 421.

(*t*) *Pugh* v. *Leeds* (*Duke*) (1777), 2 Cowp. 714; *Haigh* v. *Brooks* (1839), 10 Ad. & El. 309, Ex. Ch.; *Wilkinson* v. *Gaston* (1846), 9 Q. B. 137; *Pollock* v. *Stacy* (1847), 9 Q. B. 1033; *Mills* v. *Dunham*, [1891] 1 Ch. 576, 590, C. A.; *Goldshede* v. *Swan* (1847), 1 Exch. 154; *Stratford* v. *Bosworth* (1813), 2 Ves. & B. 341. Thus, if one construction makes a contract lawful and another unlawful, the former is preferred (*Lewis* v. *Davison* (1839), 4 M. & W. 654).

(*u*) And if one of such documents is ambiguous and the other clear, then force is given to the one which is clear to interpret the other (*Re Phœnix Bessemer Steel Co.* (1875), 44 L. J. (CH.) 683).

(*a*) *Gartside* v. *Silkstone and Dodworth Coal and Iron Co.* (1882), 21 Ch. D. 762; *Taylor* v. *Horde* (1757), 1 Burr. 60.

(*b*) *Saunderson* v. *Piper* (1839), 5 Bing. (N. C.) 425.

(*c*) *Robertson* v. *French* (1803), 4 East, 130, *per* Lord ELLENBOROUGH, C.J., at p. 136; *Joyce* v. *Realm Insurance Co.* (1872), L. R. 7 Q. B. 580, 583; *Western Assurance Co. of Toronto* v. *Poole*, [1903] 1 K. B. 376, 388; *Gumm* v. *Tyrie* (1865), 6 B. & S. 298. See *Glynn* v. *Margetson & Co.*, [1893] A. C. 351, 354; but see also *Jessel* v. *Bath* (1867), L. R. 2 Exch. 267.

(*d*) *Lucas* v. *James* (1849), 7 Hare, 410, 419; see, however, *Francis* v. *Grover* (1845), 5 Hare, 39, and *Re Adams* (1872), L. R. 2 P. & D. 367 (these two cases refer to pencil writing in a will).

SECT. 2. Written Contracts.

Alternatives.

1045. If an agreement provides for two alternatives without saying at whose option one of the alternatives is to be exercised, the general rule is that the option is with the party who is to do the act in question. Thus, where the plaintiff agreed to lend the defendant £50 for "nine or six months," the borrower, being required to do the act in respect of which the alternative periods were specified (*i.e.*, to repay the money), was held entitled to the option of either period (*e*). If a lease be granted simply "to hold for seven, fourteen, or twenty-one years" the tenant has the option of deciding after which period the lease shall determine, on the principle that a grant is construed most strongly in favour of the grantee (*f*); but where a lease is determinable at a certain date "if the parties shall so think fit," this is to be construed as "if both parties shall think fit" and the joint assent of lessor and lessee is necessary (*g*); and where a promise is in the alternative, and one branch of the alternative cannot be performed, the promisor is bound as a general rule to perform the other (*h*).

Where a party issued an instrument in such ambiguous terms that it might be treated either as a bill of exchange or a promissory note, the holder was allowed to elect, as against the maker, to treat it as either (*i*).

Conditions and warranties.

1046. A question of construction which commonly arises is whether a clause in an agreement constitutes a condition precedent, the breach of which justifies a repudiation of the contract, or is merely an independent agreement or a warranty, the breach of which gives merely a right of action for damages. The test to be applied is whether the clause goes to the root of the contract, in which case it constitutes a condition precedent, or whether it only goes to part of the consideration and may without affecting the substance of the contract be compensated in damages. The intention of the parties must be looked at with regard to the circumstances

(*e*) *Reed* v. *Kilburn Co-operative Society* (1875), L. R. 10 Q. B. 264; see also *Chippendale* v. *Thurston* (1829), 4 C. & P. 98, where the lender was required to do the act, *i.e.*, give notice, and therefore was entitled to the option; *Layton* v. *Pearce* (1778), 1 Doug. (K. B.) 15; *Tilling, Ltd.* v. *James* (1906), 94 L. T. 823, C. A.; *Stewart & Co., Ltd.* v. *Rendall* (1899), 36 Sc. L. R. 775; 1 F. (Ct. of Sess.) 1002.

(*f*) *Dann* v. *Spurrier* (1803), 3 Bos. & P. 399; *Doe* d. *Webb* v. *Dixon* (1807), 9 East, 15; *Price* v. *Dyer* (1810), 17 Ves. 356, at p. 363; *Powell* v. *Smith* (1872), 41 L. J. (CH.) 734. Similarly, where goods are bought at six or nine months' credit the purchaser has the option (*Price* v. *Nixon* (1814), 5 Taunt. 338; *Deverill* v. *Burnell* (1873), L. R. 8 C. P. 475, 480). See, however, *Ashforth* v. *Redford* (1873), L. R. 9 C. P. 20, where "from six to eight weeks" was held to be used in a special mercantile sense.

(*g*) *Fowell* v. *Tranter* (1864), 3 H. & C. 458.

(*h*) *Stevens* v. *Webb* (1835), 7 C. & P. 60; *McIlquham* v. *Taylor* (1894), 71 L. T. 679, C. A.; *Barkworth* v. *Young* (1856), 4 Drew. 1. A promisor who has elected to perform one alternative is not as a general rule excused from performance of the other by reason that performance according to his election has become impossible (*Brown* v. *Royal Insurance Co.* (1859), 1 E. & E. 853). And see p. 429, *ante*.

(*i*) *Edis* v. *Bury* (1827), 6 B. & C. 433. "Where a person makes a communication to another in ambiguous terms he cannot afterwards complain if the recipient of the communication puts upon it a meaning not intended by the sender" (*per* CHANNELL, J., *Miles* v. *Haslehurst & Co.* (1906), 23 T. L. R. 142).

of each particular case, and, having regard to such circumstances, the intention is to be ascertained according to the ordinary rules for the construction of written instruments (*k*).

In the case of the sale of goods a warranty is defined by statute (*l*) and distinguished from a condition (*m*).

On the other hand, both conditions and warranties must be distinguished from words of expectation and estimate which do not form part of the contract at all nor give rise to any claim for damages (*n*). A representation made in the course of negotiations for a contract may amount to a condition or warranty. Whether it does so or not depends upon whether it was intended by the parties to form part of the contract (*o*).

(*k*) 1 Wms. Saund., 1870 ed., 549 in notes; 2 Smith, L. C., 11th ed., 12. See *Graves* v. *Legg* (1854), 9 Exch. 709, 716 (declaration of name of ship in which wool shipped a condition precedent to obligation to accept the wool); *Behn* v. *Burness* (1863), 3 B. & S. 751, Ex. Ch. (statement in charter-party that ship "now in port of A." a condition precedent); *Roberts* v. *Brett* (1865), 11 H. L. Cas. 337 (giving a bond for due performance held a condition precedent to right to sue for non-performance by other party); *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, 404 (sale of patented article); *Azemar* v. *Casella* (1867), 36 L. J. (C. P.) 263, Ex. Ch., and *Heyworth* v. *Hutchinson* (1867), L. R. 2 Q. B. 447 (sale of goods—a guarantee, not a condition; see also title SALE OF GOODS); *Barnard* v. *Faber*, [1893] 1 Q. B. 340, C. A. (fire insurance policy; see also title INSURANCE). As to construction generally, see title DEEDS AND OTHER INSTRUMENTS. A contract under seal is construed in the same way as a contract not under seal (*Seddon* v. *Senate* (1810), 13 East, 63, 74). For other examples where clauses have been held to be conditions precedent reference may be made to *Poussard* v. *Spiers* (1876), 1 Q. B. D. 410 (appearance of opera singer at first performance); *Neale* v. *Ratcliff* (1850), 15 Q. B. 916 (agreement to repair—premises first being put into repair by other party); *Thomas* v. *Cadwallader* (1744), Willes, 496 (covenant to repair—lessor allowing and assigning timber). The following cases furnish examples of clauses which have been held to be independent promises and not conditions precedent:—*Bettini* v. *Gye* (1876), 1 Q. B. D. 183 (agreement to attend rehearsals for so many days before performance); *Christie* v. *Borelli* (1860), 7 C. B. (N. S.) 561 (cross guarantees); *Seeyer* v. *Duthie* (1860), 8 C. B. (N. S.) 45 (charterparty, readiness of ship to sail); *Havelock* v. *Geddes* (1809), 10 East, 555 (charter-party, agreement to repair ship); *Pust* v. *Dowie* (1864), 5 B. & S. 20 (charter-party, ship to take not less than 1,000 tons); *Bristol* (*Dean etc.*) v. *Jones* (1859), 1 E. & E. 484 (covenant to repair in lease); *Edge* v. *Boileau* (1885), 16 Q. B. D. 117 (covenants for quiet enjoyment and payment of rent); *Jowett* v. *Spencer* (1847), 1 Exch. 647, Ex. Ch. (finding of coal not a condition precedent to payment of consideration on sale of coal mine). For conditions generally, see p. 432, *ante*.

(*l*) "An agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated" (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62).

(*m*) *Ibid.*, ss. 10—14.

(*n*) *McConnel* v. *Murphy* (1873), L. R. 5 P. C. 203 (sale of "say about 600 spars" held complied with by delivery of 496 spars); see also *Gwillim* v. *Daniell* (1835), 2 Cr. M. & R. 61; *Morris* v. *Levison* (1876), 1 C. P. D. 155; *McLay & Co.* v. *Perry & Co.* (1881), 44 L. T. 152; *Leeming* v. *Snaith* (1851), 16 Q. B. 275; *Power* v. *Barham* (1836), 4 Ad. & El. 473; and title SALE OF GOODS.

(*o*) *Hopkins* v. *Tanqueray* (1854), 15 C. B. 130; *Carter* v. *Crick* (1859), 4 H. & N. 412; *Budd* v. *Fairmaner* (1831), 8 Bing. 48; *Pasley* v. *Freeman* (1789), 3 Term Rep. 51, 57; 2 Smith, L. C., 11th ed., 66; *Bannerman* v. *White* (1861), 31 L. J. (C. P.) 28; *Stucley* (*Bart.*) v. *Baily* (1862), 31 L. J. (EX.) 483. As to the

SECT 2. Written Contracts.

Time clauses.

On the same principle, in the case of contracts which require a thing to be done within a certain time, it becomes necessary for the court to decide whether time is "of the essence of the contract." Time clauses are found chiefly in contracts of sale, and the general rule has been established that in the case of a sale of land time is not of the essence of the contract, while in the case of a sale of goods the question depends on the terms of the contract, but stipulations as to the time of payment are presumed not to be of the essence of the contract unless a different intention appears from the terms thereof (*p*).

Entire and divisible contracts.

1047. Other matters on which construction by the court is sometimes required, but which involve no special rules beyond the general principles above laid down, are whether contracts are entire or divisible, and whether contracts are joint, or several, or joint and several. Contracts are indivisible where the consideration is one and entire, or where it is stated or can be gathered by necessary inference that no consideration is to pass from one party till the whole of the obligations of the other party have been completed (*q*); but where no such intention can be gathered, and the contract resolves itself into a number of considerations for a number of acts, as in the case of periodical payments for a number of services which do not form one complete whole, the contract is divisible (*r*), and if part thereof is void or illegal such part may be separated from and does not affect the validity of the rest.

Joint and several contracts.

Whether a contract is to be construed as joint, or several, or joint and several, depends on the ordinary rules of construction, and the intention of the parties as gathered from the contract as a whole, construed with reference to the surrounding circumstances (*s*).

admissibility of evidence of a verbal warranty where the contract is in writing, see p. 528, *post*.

(*p*) As to when time is deemed to be of the essence of the contract, generally, see p. 413, *ante*; and as to the computation of days of grace in case of bills of exchange, see title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 477; and as to time generally and the construction of specific terms and periods of time, see title TIME. What is a "reasonable" time in any particular case is a question of fact for the jury (*Nelson* v. *Patrick* (1846), 2 Car. & Kir. 641).

(*q*) *Bates* v. *Hudson* (1825), 6 Dow. & Ry. (K. B.) 3 (agreement to cure "all or none" of a flock of sheep); *Adlard* v. *Booth* (1835), 7 C. & P. 108; *Cutter* v. *Powell* (1795), 6 Term Rep. 320; *Whitcher* v. *Hall* (1826), 5 B. & C. 269; *Hopkins* v. *Prescott* (1847), 4 C. B. 578; *Savage* v. *Canning* (1867), 16 W. R. 133 (C. P. Ir.); *Chater* v. *Beckett* (1797), 7 Term Rep. 201.

(*r*) Thus, an engagement for an uncertain period at a stated payment "per month" was held divisible into a number of monthly contracts (*Taylor* v. *Laird* (1856), 1 H. & N. 266). Where an entire contract for the sale of goods has been partly performed, and the buyer has accepted the benefit of that part, the contract, though originally indivisible, is to be treated as divisible (*Shipton* v. *Casson* (1826), 5 B. & C. 378). As to divisibility of covenants, see title DEEDS AND OTHER INSTRUMENTS.

(*s*) See *Lee* v. *Nixon* (1834), 1 Ad. & El. 201; *Collins* v. *Prosser* (1823), 1 B. & C. 682; *Fell* v. *Goslin* (1852), 21 L. J. (EX.) 145. There is no rule of equity whereby a joint contract may be treated as joint and several, though in certain cases a remedy has been given against the assets of a deceased partner (*Kendall* v. *Hamilton* (1879), 4 App. Cas. 504, 521). Whether a partner opening a

1048. With regard to the law applicable to the construction of a contract the intention of the parties is to prevail, but it will be presumed (unless a contrary intention appears) that where a contract is to be performed in the country in which it has been made the law of that country is intended to apply, but if it is to be performed in another country then the law of that other country is intended to apply (*t*). What law applicable.

SECT. 3.—*Admissibility of Parol Evidence.*

1049. When a contract has been reduced to writing, parol evidence is not as a general rule admissible for the purpose of showing that the written document, interpreted in accordance with the ordinary rules of construction, does not express the true and complete intention of the parties; in other words, it is a rule of law that parol evidence is not admissible either to contradict, vary, add to, or subtract from, the terms of a written agreement (*a*). General rule.

The rule is not confined to contracts which are required by law to be evidenced by writing in order to be enforceable, but applies generally in all cases where the agreement between the parties is in fact reduced to writing (*a*); and apart from mistake or

banking account in his own name is contracting severally or as agent of the partnership is a question of fact for the jury (*Cooke* v. *Seeley* (1848), 2 Exch. 746); and see p. 338, *ante*.

(*t*) *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, C. A.; see, for a detailed treatment of the subject, title CONFLICT OF LAWS, Vol. VI., p. 238.

(*a*) *Holmes* v. *Mitchell* (1859), 7 C. B. (N. S.) 361; *Burges* v. *Wickham* (1863), 3 B. & S. 669; *Inglis* v. *Buttery* (1878), 3 App. Cas. 552; *Lloyd* v. *Sturgeon Falls Pulp Co.* (1901), 85 L. T. 162 (parol evidence not admissible to enlarge the scope of a written warranty); *Preston* v. *Merceau* (1779), 2 Wm. Bl. 1249 (evidence not admissible to prove an agreement to pay an additional rent to that mentioned in a lease); *Smith* v. *Jeffryes* (1846), 15 M. & W. 561 (evidence inadmissible to show that a written agreement for the sale of ware potatoes was intended to apply to a particular quality of potatoes of that description); *Harnor* v. *Groves* (1855), 15 C. B. 667 (evidence inadmissible to prove a verbal representation amounting to a warranty; and see *Chanter* v. *Hopkins* (1838), 4 M. & W. 399, at p. 406). If goods are sold by a written agreement which describes their quality, and makes no reference to any sample, evidence is not admissible at the instance of either buyer or seller to prove that a sample was shown at the time of the sale in order to show that it was a sale by sample (*Tye* v. *Fynmore* (1813), 3 Camp. 462; *Meyer* v. *Everth* (1814), 4 Camp. 22). If on the construction of a written contract made by an agent he is personally liable, parol evidence is not admissible to show that the parties did not intend that he should be so liable (*Higgins* v. *Senior* (1841), 8 M. & W. 834; *Jones* v. *Littledale* (1837), 1 Nev. & P. (K. B.) 677; *Holding* v. *Elliott* (1860), 5 H. & N. 117; but see *Wake* v. *Harrop* (1862), 1 H. & C. 202, Ex. Ch., and title AGENCY, Vol. I., p. 220). The verbal declarations of the auctioneer at a sale by auction cannot be proved in order to vary or add to the written or printed conditions (*Gunnis* v. *Erhart* (1789), 1 Hy. Bl. 290; *Shelton* v. *Livius* (1832), 2 Cr. & J. 411; *Powell* v. *Edmunds* (1810), 12 East, 6; compare *Brett* v. *Clowser* (1880), 5 C. P. D. 376; and see title AUCTION AND AUCTIONEERS, Vol. I., p. 510). In the case of a bill of exchange or promissory note, evidence of an oral contemporaneous agreement to renew the instrument (*New London Credit Syndicate* v. *Neale*, [1898] 2 Q. B. 487, C. A.), or to deposit securities which should be sold in the event of its not being paid (*Abrey* v. *Crux* (1869), L. R. 5 C. P. 37), or not to demand payment until after the sale of certain estates (*Free* v. *Hawkins* (1817), 8 Taunt. 92), or to dispense with notice of dishonour (*ibid.*), or otherwise altering the legal effect of the instrument, is not admissible, even as between the immediate

SECT. 3. Admissibility of Parol Evidence.

misrepresentation or some other special ground of defence in actions for specific performance, the rule is of equal force in equity as at law (*b*).

Parol evidence is not only excluded as a general rule in reference to matters which are expressly dealt with by the written agreement, but also in reference to terms implied by law with regard to which the document is silent (*c*).

Surrounding circumstances.

1050. A written agreement must, however, in all cases be construed with reference to the surrounding circumstances, and parol evidence is accordingly admissible of the circumstances of the particular case in order to enable the court to apply the written terms to those circumstances (*d*). Thus, parol evidence is admissible to identify the parties (*e*) or property (*f*) named or described in

parties (see also title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 552 *et seq.*). And see the cases cited in the two following notes.

(*b*) *Clowes* v. *Higginson* (1813), 1 Ves. & B. 524; *Woollam* v. *Hearn* (1802), 7 Ves. 211 b; *Rich* v. *Jackson* (1794), 4 Bro. C. C. 514; *Ball* v. *Storie* (1823), 1 Sim. & St. 210; *Price* v. *Dyer* (1811), 17 Ves. 356; *Martin* v. *Pycroft* (1852), 2 De G. M. & G. 785; *Croome* v. *Lediard* (1833), 2 My. & K. 251. As to misrepresentation and mistake, see those titles; and as to special defences in actions for specific performance, see title SPECIFIC PERFORMANCE. Parol evidence, however, is always admissible to show that what purports to be a sale was intended as a mortgage (see title MORTGAGE).

(*c*) *Evans* v. *Roe* (1872), L. R. 7 C. P. 138 (written agreement for service at a weekly salary, implying a weekly hiring: evidence of conversations showing an intention that the hiring should be a yearly one not admissible); *Ford* v. *Yates* (1841), 2 Man. & G. 549 (written contract for sale of hops, nothing being said as to credit: held, evidence not admissible to show that by the course of dealing between the parties the buyer was entitled to six months' credit; but see *Lockett* v. *Nicklin* (1848), 2 Exch. 93); *Rich* v. *Jackson* (1794), 4 Bro. C. C. 514 (lease silent as to payment of taxes; evidence not admissible to prove a verbal agreement that it was to be free of all taxes); *Croome* v. *Lediard*, *supra* (agreement by A. to buy an estate from B., and B. to buy another estate from A.; evidence not admissible to show that a mutual exchange was intended, and that the contracts were to be dependent on each other: specific performance of one of the contracts decreed, though the defendant was unable to show a good title to the property sold by him).

(*d*) *Mason* v. *Cole* (1849), 4 Exch. 375 (building scheme); *Oliver* v. *Hunting* (1889), 44 Ch. D. 205; *Cave* v. *Hastings* (1881), 7 Q. B. D. 125; *Stucley* v. *Baily* (1862), 1 H. & C. 405; *Mumford* v. *Gething* (1859), 7 C. B. (N. S.) 305; *Spicer* v. *Martin* (1888), 14 App. Cas. 12 (restrictive covenants in lease; similar covenants in other leases of premises forming part of the same block of buildings). The extent of a repairing covenant in a lease must be measured by the age and class of the buildings demised, of which parol evidence may be given (*Proudfoot* v. *Hart* (1890), 25 Q. B. D. 42; *Payne* v. *Haine* (1847), 16 M. & W. 541; and see *Burges* v. *Wickham* (1863), 3 B. & S. 669). As to proof of surrounding circumstances to show the nature and extent of a guarantee, see title GUARANTEE; and as to proof of such circumstances to explain the meaning of terms in sea policies, see title INSURANCE.

(*e*) *Sale* v. *Lambert* (1874), L. R. 18 Eq. 1; *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124; *Catling* v. *King* (1877), 5 Ch. D. 660; *Commins* v. *Scott* (1875), L. R. 20 Eq. 11; *Carr* v. *Lynch*, [1900] 1 Ch. 613.

(*f*) *Shardlow* v. *Cotterell* (1881), 20 Ch. D. 90, C. A.; *Plant* v. *Bourne*, [1897] 2 Ch. 281; *Cowley* v. *Watts* (1853), 17 Jur. 172; *Ogilvie* v. *Foljambe* (1817), 3 Mer. 53; *Owen* v. *Thomas* (1834), 3 My. & K. 353; *Wood* v. *Scarth* (1855), 2 K. & J. 33; *Macdonald* v. *Longbottom* (1860), 1 E. & E. 977, 987, Ex. Ch.; *Lyle* v. *Richards* (1866), L. R. 1 H. L. 222; *McMurray* v. *Spicer* (1868), L. R. 5 Eq. 527; *Horsey* v. *Graham* (1869), L. R. 5 C. P. 9.

a written agreement; to identify documents referred to therein (*g*); to show the circumstances of the parties from which their relative positions in relation to the contract may be inferred (*h*); to prove circumstances from which it may be inferred what property was intended to pass by a certain description (*i*), or the nature of the employment intended in such a phrase as "in consideration of my entering your employ" (*k*); or to prove circumstances tending to show that representations in letters forming the contract which might be construed as warranties were not intended as such (*l*).

Identity.

1051. Where a contract is made by an agent in his own name parol evidence is admissible to show who the principal is, for the purpose either of charging him on the contract or of enabling him to enforce it (*m*), except where the evidence is inconsistent with the express terms of the written agreement (*n*). So where a person contracts professedly as an agent, it may be shown by parol evidence that he is in fact the principal in order to charge him on the contract (*o*). An agent who enters into a contract in writing in such terms as to be personally liable on the true construction of the contract may nevertheless prove, as an equitable plea, an express oral agreement that he should not be personally sued on the contract (*p*).

Agency.

1052. Written agreements must also be construed with reference to any particular customs or usages applicable to the circumstances of the case. Parol evidence is therefore admissible of any such

Custom.

(*g*) *Morris* v. *Wilson* (1859), 5 Jur. (N. S.) 168; *Hodges* v. *Horsfall* (1829), 1 Russ. & M. 116 (identification of plan referred to); *Jones* v. *Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314, C. A. Parol evidence is also admissible to prove the connection between two documents such as a letter and the envelope enclosing it (*Pearce* v. *Gardner*, [1897] 1 Q. B. 688); see p. 369, *ante*.

(*h*) *Newell* v. *Radford* (1867), L. R. 3 C. P. 52.

(*i*) *Doe* d. *Freeland* v. *Burt* (1787), 1 Term Rep. 701; *Thomas* v. *Owen* (1888), 20 Q. B. D. 225, C. A.; *Goodtitle* d. *Radford* v. *Southern* (1813), 1 M. & S. 299; *Beaufort* (*Duke*) v. *Swansea Corporation* (1849), 3 Exch. 413.

(*k*) *Mumford* v. *Gething* (1859), 7 C. B. (N. S.) 305 (previously employed by same employer under a verbal agreement).

(*l*) *Stucley* v. *Baily* (1862), 1 H. & C. 405.

(*m*) *Bateman* v. *Phillips* (1812), 15 East, 272; *Wilson* v. *Hart* (1817), 1 Moore (C. P.), 45; *Trueman* v. *Loder* (1840), 11 Ad. & El. 589; *Morris* v. *Wilson* (1859), 5 Jur. (N. S.) 168; *Calder* v. *Dobell* (1871), L. R. 6 C. P. 486; *Weidner* v. *Hoggett* (1876), 1 C. P. D. 533; *Spurr* v. *Cass* (1870), L. R. 5 Q. B. 656. See title AGENCY, Vol. I., p. 207. But parol evidence is not admissible for the purpose of exonerating the agent (*Higgins* v. *Senior* (1841), 8 M. & W. 834).

(*n*) *Humble* v. *Hunter* (1848), 12 Q. B. 310, where an agent was described in a charterparty as the owner of the vessel, and it was held that parol evidence was inadmissible to show that he was not the owner, so as to entitle the real owner to sue on the contract.

(*o*) *Railton* v. *Hodgson* (1804), cited 15 East, 67; *Jenkins* v. *Hutchinson* (1849), 13 Q. B. 744; *Carr* v. *Jackson* (1852), 7 Exch. 382; *Adams* v. *Hall* (1877), 37 L. T. 70; *Hutcheson* v. *Eaton* (1884), 13 Q. B. D. 861. As to the right of the agent to sue on the contract in such a case, see *Bickerton* v. *Burrell* (1816), 5 M. & S. 383; *Rayner* v. *Grote* (1846), 15 M. & W. 359; *Schmalz* v. *Avery* (1851), 20 L. J. (Q. B.) 228; *Sharman* v. *Brandt* (1871), L. R. 6 Q. B. 720, Ex. Ch.

(*p*) *Wake* v. *Harrop* (1862), 1 H. & C. 202, Ex. Ch.; *Cowie* v. *Witt* (1874), 23 W. R. 76. It would be inequitable in such a case for the other contracting party to take advantage of his having contracted in such a form as to be personally liable.

SECT. 3. Admissibility of Parol Evidence.

custom or usage for the purpose of explaining the terms of a written agreement or adding provisions which are not inconsistent therewith, but not for the purpose of contradicting the express terms of the agreement or of inserting provisions which are inconsistent with such terms (*q*).

Latent ambiguity.

1053. Where the terms of a written agreement are ambiguous with reference to the circumstances of the particular case, and the ambiguity does not appear on the face of the document, parol evidence is admissible to explain the ambiguity, the question which of two or more possible meanings was intended in such a case being one of fact for the jury (*r*).

Date.

1054. Parol evidence is also admissible to prove the true date of the execution of a written agreement though it purports to have been executed on some other date (*s*), or, where two or more documents appear to have been executed on the same date, to show in what order they were executed (*t*).

Intention not to make binding contract.

1055. It may also be proved by parol evidence that a document which purports to be a contract was not intended to be a binding agreement, although it is signed by the person who refuses to be bound by it (*a*). Thus, in the case of bought and sold notes, it may be shown by either party that the sale was merely colourable and the price nominal, and that it was not their intention in signing the notes to make a binding contract (*b*); or, in the case of a document purporting to be a written agreement for the sale of property, it may be shown that it was only a pretended sale to avoid execution against the property (*c*).

It is in all cases a question of fact whether a particular document was intended to express the terms of the contract between the parties (*d*), and with what intention it was signed by one or

(*q*) See p. 511, *ante*, and cases there cited; and for a treatment of the subject in detail, title CUSTOMS AND USAGES.

(*r*) *Robinson* v. *Great Western Rail. Co.* (1865), 35 L. J. (C. P.) 123 (parol evidence admitted to show which of two stations of the same name was intended); *Goldshede* v. *Swan* (1847), 1 Exch. 154; *Smith* v. *Thompson* (1849), 8 C. B. 44; *Hordern* v. *Commercial Union Insurance Co.* (1887), 56 L. J. (P. C.) 78; *Macdonald* v. *Longbottom* (1859), 1 E. & E. 977, 987, Ex. Ch.; *The Curfew*, [1891] P. 131; *Lyle* v. *Richards* (1866), L. R. 1 H. L. 222; *Sweet* v. *Lee* (1841), 3 Man. & G. 452; *Daintree* v. *Hutchinson* (1842), 10 M. & W. 85.

(*s*) *Hall* v. *Cazenove* (1804), 4 East, 477; *Steele* v. *Mart* (1825), 4 B. & C. 272.

(*t*) *Gartside* v. *Silkstone and Dodworth Coal and Iron Co.* (1882), 21 Ch. D. 762.

(*a*) *Pattle v. Hornibrook*, [1897] 1 Ch. 25 (document signed by both plaintiff and defendant: it was held that the defendant might prove that he did not intend to be bound until satisfied as to the plaintiff's responsibility). See also *Clever* v. *Kirkman* (1875), 33 L. T. 672; *Lewis* v. *Brass* (1877), 3 Q. B. D. 667; *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311, *per* Lord SELBORNE, at p. 323.

(*b*) *Rogers* v. *Hadley* (1863), 2 H. & C. 227.

(*c*) *Bowes* v. *Foster* (1858), 2 H. & N. 779.

(*d*) *Allen* v. *Pink* (1838), 4 M. & W. 140 (receipt given on the sale of a horse held not to exclude evidence of a verbal warranty, there being no evidence that the buyer had agreed that the receipt should contain a statement of the whole of the terms of the contract); *Moore* v. *Campbell* (1854), 10 Exch. 323 (broker, employed by buyer, sent contract note to seller; seller sent note to broker varying the terms: held, in an action by the buyer, a question of fact whether the note sent by the seller was intended by both parties to be the contract

other of the parties (*e*), and on these points parol evidence is admissible.

Oral acceptance.

1056. Where a written proposal is accepted verbally, with variations, it is a question of fact, to be decided by parol evidence, what are the terms of the contract between the parties (*f*); and parol evidence is in all cases admissible to show what are the actual terms of the contract where the written document is not intended to express the whole of the agreement between the parties (*g*).

State of document.

Parol evidence is also admissible to show what was the actual condition of a document, which appears to have been altered, at the time when it was executed or assented to (*h*).

Condition precedent to binding contract.

1057. Parol evidence is admissible to show that a written agreement which purports to be unconditional was in fact executed with the intention that it should only take effect as a contract on the performance of a condition precedent (*i*). For example, in the case of a written agreement for the assignment of a lease, it may be proved that there was a contemporaneous oral agreement that the contract should be null and void if the lessor did not consent to the assignment (*k*); a person signing a contract as a surety may prove that he only intended to be bound in the event of a proposed co-surety joining (*l*); a contemporaneous oral agreement that a written contract should not be a bargain unless a third person approved of it may be proved (*m*); and a person who has signed an agreement may prove that he did not intend to bind himself until he had satisfied himself of the responsibility of the other contracting party, and that the other party knew that (*n*). So, it may be proved that a written agreement was not intended to operate from the time of its execution but from some future and uncertain time (*o*).

Escrow.

between them); *Jones* v. *Littledale* (1837), 1 Nev. & P. (K. B.) 677 (invoice by brokers as sellers of goods by auction); *Holding* v. *Elliott* (1860), 5 H. & N. 117; *Long* v. *Millar* (1879), 4 C. P. D. 450, C. A.

(*e*) *Latch* v. *Wedlake* (1840), 11 Ad. & El. 959 (agreement expressed to be made between the plaintiff and three partners, executed by the plaintiff and two of the partners: held, a question for the jury whether the two partners intended to sign on behalf of all three, the circumstances indicating that the partners did not intend to be bound unless all three signed); *Young* v. *Schuler* (1883), 11 Q. B. D. 651, C. A. (evidence to show that a person contracting as an agent intended to sign, not only as an agent, but also as a surety for the principal).

(*f*) *Stones* v. *Dowler* (1860), 29 L. J. (EX.) 122; *Reuss* v. *Picksley* (1866), L. R. 1 Exch. 342, Ex. Ch.; *Stewart* v. *Eddowes* (1874), L. R. 9 C. P. 311.

(*g*) *Harris* v. *Rickett* (1859), 4 H. & N. 1.

(*h*) *Stewart* v. *Eddowes* (1874), L. R. 9 C. P. 311.

(*i*) *Moore* v. *Campbell* (1854), 10 Exch. 323 (broker sending a sold note may show that it was only intended to operate as a contract if the person to whom it was sent signed and returned a corresponding note); *Latch* v. *Wedlake* (1840), 11 Ad. & El. 959; *Clever* v. *Kirkman* (1876), 33 L. T. 672; and cases cited in the following notes. As to the delivery of a deed as an escrow, see *Furness* v. *Meek* (1857), 27 L. J. (EX.) 34, and title DEEDS AND OTHER INSTRUMENTS.

(*k*) *Wallis* v. *Littell* (1861), 11 C. B. (N. S.) 369.

(*l*) *Evans* v. *Bremridge* (1856), 8 De G. M. & G. 100.

(*m*) *Pym* v. *Campbell* (1856), 6 E. & B. 370.

(*n*) *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25.

(*o*) *Davis* v. *Jones* (1856), 17 C. B. 625.

SECT. 3. Admissibility of Parol Evidence.

The principle applies to bills of exchange and other negotiable instruments delivered subject to a condition, as between the immediate parties (*p*).

Collateral oral agreement.

1058. A contemporaneous oral agreement with respect to some collateral matter as to which a written contract is wholly silent may be proved by parol evidence (*q*). The following are examples of what have been held to be collateral agreements for this purpose: a promise by the lessor to "destroy the rabbits" or "kill down the game" on the execution by the lessee of the lease of a farm (*r*); a promise by the landlord to do repairs and send in furniture on the letting of a dwelling-house (*s*); a promise that in consideration of a person signing an agreement for the sale of a business, the other contracting party would settle an action then pending against the first-mentioned person at the suit of a third person (*t*); a verbal warranty by the lessor that the drains were in good order on the execution of a lease of a dwelling-house (*a*).

Evidence of validity.

1059. Parol evidence is always admissible to prove facts tending to show that a written contract is void or voidable, as, for instance, facts showing want of capacity (*b*), want of assent by reason of mistake (*c*), fraud (*d*), duress (*e*), undue influence (*f*), non-disclosure of material facts (*c*), want or failure of consideration (*g*), or illegality (*h*), or for the purpose of proving mistake or misrepresentation, or any other matter giving ground for relief in equity (*i*). Also to prove that a written contract has been rescinded or varied by a subsequent oral agreement, provided that proof of the oral agreement is not excluded by any statute (*k*).

(*p*) *Bell* v. *Ingestre* (*Viscount*) (1848), 12 Q. B. 317 (bill indorsed and delivered on condition that other bills should be retired); see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 21 (2), and title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 482.

(*q*) *Lloyd* v. *Sturgeon Falls Pulp Co.* (1901), 85 L. T. 162 (verbal warranty respecting matter on which a written contract was silent); *Mercantile Agency Co.* v. *Flitwick Chalybeate Co.* (1897), 14 T. L. R. 90, H. L.; and cases cited in following notes.

(*r*) *Morgan* v. *Griffith* (1871), L. R. 6 Exch. 70; *Erskine* v. *Adeane* (1873), 8 Ch. App. 756.

(*s*) *Angell* v. *Duke* (1875), L. R. 10 Q. B. 174; compare *Spicer* v. *Martin* (1888), 14 App. Cas. 12.

(*t*) *Lindley* v. *Lacey* (1864), 17 C. B. (N. S.) 578.

(*a*) *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215, C. A.

(*b*) See p. 341, *ante*.

(*c*) See p. 354, *ante*.

(*d*) See title MISREPRESENTATION AND FRAUD.

(*e*) See p. 356, *ante*.

(*f*) See p. 357, *ante*.

(*g*) See p. 383, *ante*.

(*h*) See p. 390, *ante*.

(*i*) See titles MISREPRESENTATION AND FRAUD; MISTAKE; SPECIFIC PERFORMANCE.

(*k*) *E.g.*, by the Statute of Frauds (29 Car. 2, c. 3). See p. 422, *ante*.

Part IX.—Stamp Duties (*l*).

SECT. 1. In General.

SECT. 1.—*In General.*

Agreement under hand.

1060. Subject to certain exemptions (*m*), every agreement or memorandum of an agreement (*n*) under hand only, and not otherwise specifically charged with duty (*o*), is subject to a stamp duty of sixpence, whether it is only evidence of a contract or obligatory on the parties from its being a written instrument (*p*).

The duty may be denoted by an adhesive stamp or stamps, which must be cancelled by the person by whom the agreement is first executed (*q*), by writing on or across the stamp his name or initials, together with the date of his so writing, or otherwise effectively rendering the stamp incapable of being used again (*r*). Where two or more stamps are used to denote the duty all of them must be cancelled (*s*).

Deeds.

1061. Every contract under seal (*a*) not otherwise specifically charged with duty (*o*) is subject to a duty of ten shillings (*p*), which must be denoted by an impressed stamp (*b*).

Counterparts.

1062. A duplicate or counterpart of any deed or agreement chargeable with duty must be stamped with the same duty as the original instrument where such duty is less than five shillings, and otherwise with a duty of five shillings (*c*).

Stamping after execution.

1063. An unstamped or insufficiently stamped agreement subject to the fixed duty of sixpence or ten shillings may be stamped after execution on payment of the unpaid duty and a penalty of ten pounds; or if first executed at any place out of the United Kingdom it may be stamped, at any time within thirty days after it has been first received in the United Kingdom, on payment of the unpaid duty only without any penalty (*d*).

(*l*) As to stamping receipts, see p. 452, *ante*.
(*m*) See p. 538, *post*.
(*n*) As to what documents require stamping, see p. 535, *post*.
(*o*) See p. 532, *post*.
(*p*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1, and Schedule.
(*q*) *Ibid.*, s. 22.
(*r*) *Ibid.*, s. 8 (1).
(*s*) *Ibid.*, s. 8 (2). Any person whose duty it is to cancel an adhesive stamp neglecting or refusing to do so duly and effectually is liable to a fine of ten pounds (*ibid.*, s. 8 (3)).
(*a*) See *Clayton* v. *Burtenshaw* (1826), 5 B. & C. 41; *Robinson* v. *Drybrough* (1795), 6 Term Rep. 317.
(*b*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 2.
(*c*) *Ibid.*, s. 1, and Schedule; and see s. 72.
(*d*) *Ibid.*, s. 15. The Inland Revenue Commissioners may, if they think fit, at any time within three months after the first execution of any instrument, mitigate or remit any penalty payable on stamping (*ibid.*, s. 15 (3) (b)). As a matter of grace, the Commissioners allow agreements under hand only to be stamped with an impressed stamp within fourteen days after execution without any penalty, and agreements under seal to be so stamped within thirty days after execution, but this is a concession which the Commissioners may withdraw at any time.

SECT. 1. In General.

Unstamped agreement as evidence.

1064. Any such unstamped or insufficiently stamped agreement may be received in evidence on payment to the proper officer of the amount of unpaid duty and penalty, and a further sum of one pound (*e*), but otherwise may not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever (*f*).

The effect of this provision is that if, in the course of a plaintiff's case, it transpires that there is a written agreement, or written memorandum of the agreement, on which he is suing, he is bound to produce the writing properly stamped, or to pay the penalty, otherwise he will be unable to prove his case, parol evidence not being admissible to supply the place of the agreement or memorandum in writing (*g*). If, on the other hand, the plaintiff gives evidence of an oral or implied contract, and closes his case without it having appeared that there was any agreement or memorandum in writing, the defendant cannot answer the case so made out by the plaintiff by producing an unstamped agreement (*h*); it is for the defendant, if he desires to set up the written agreement in such a case, to produce it duly stamped or pay the penalty, because the court cannot recognise the document as being in existence unless it is

(*e*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14 (1).

(*f*) *Ibid.*, s. 14 (4). Notwithstanding the wording of this provision it has been held that an unstamped document, though not admissible in evidence, may be shown to a witness to refresh his memory (*Birchall* v. *Bullough*, [1896] 1 Q. B. 325; and see *Jacob* v. *Lindsay* (1801), 1 East, 460; *Braythwayte* v. *Hitchcock* (1842), 10 M. & W. 494; *Maugham* v. *Hubbard* (1828), 8 B. & C. 14), and that, on an application to restrain a company from carrying out the terms of an agreement with a trustee for a new company, the court was entitled to look at an unstamped copy of the agreement as a document showing the terms on which the company proposed to sell (*Mason* v. *Motor Traction Co.*, [1905] 1 Ch. 419). An agreement may of course be looked at by the court in order to ascertain whether it requires a stamp, and if so, whether it is properly stamped (*Jardine* v. *Payne* (1831), 1 B. & Ad. 663, at p. 670).

Under former Stamp Acts it was held that an unstamped or insufficiently stamped instrument might be given in evidence for the purpose of proving that it was given as part of a scheme of fraud (*R.* v. *Gompertz* (1846), 9 Q. B. 824, at p. 839; *Holmes* v. *Sixsmith* (1852), 7 Exch. 802), or for the purpose of proving illegality as a defence to an action on the agreement (*Coppock* v. *Bower* (1838), 4 M. & W. 361); or for the purpose of showing that the instrument, by reason of the want of a stamp, was worthless in an action to recover back money paid as on a total failure of consideration (*Enthoven* v. *Hoyle* (1853), 13 C. B. 373, Ex. Ch.). So where there was a question whether an instrument of guarantee had been given up in consideration of a promise by the defendant, the instrument, although not stamped, was allowed to be given in evidence in order to show that it answered the description of the instrument alleged to have been given up (*Haigh* v. *Brooks* (1839), 10 Ad. & El. 309). So, where it was pleaded that a debt had been paid by means of a bill of exchange, the creditor was permitted to put in evidence an unstamped bill to show that, by reason of its being unstamped, it was unavailable as a security, and so rebut the inference that the debt had been paid (*Smart* v. *Nokes* (1844), 6 Man. & G. 911). Notwithstanding the difference in the wording of s. 14 (4) of the Act of 1891 (54 & 55 Vict. c. 39) —"shall not be available for any purpose whatever"—it is probable that the principles of these decisions still hold good, though this is not free from doubt.

(*g*) *Buxton* v. *Cornish* (1844), 12 M. & W. 426; *Fenn* d. *Thomas* v. *Griffiths* (1830), 6 Bing. 533; *Turner* v. *Power* (1828), 7 B. & C. 625; *Rex* v. *St. Paul's, Bedford* (*Inhabitants*) (1795), 6 Term Rep. 452; *Alcock* v. *Delay* (1855), 4 E. & B. 660.

(*h*) *Fielder* v. *Ray* (1829), 6 Bing. 332; *Magnay* v. *Knight* (1840), 1 Man. & G. 944.

properly stamped, and the fact that the defendant gave the plaintiff notice to produce the document is immaterial (*i*).

Where an unstamped agreement has been lost, secondary evidence of its contents is not admissible (*j*). But an agreement which has been lost, or is not produced after notice, will be presumed to have been duly stamped in the absence of evidence to the contrary (*k*). If, however, there is evidence that the document was unstamped at any particular time, the presumption is rebutted, and the burden lies on the party who seeks to give secondary evidence of proving that the document was duly stamped (*l*).

No appeal lies, nor will a new trial be granted, on the ground of the ruling of any judge that the stamp on any document is sufficient, or that a stamp is unnecessary (*m*), nor on the ground that an unstamped document was improperly admitted in evidence (*n*).

Agreement relating to several matters.

1065. When an agreement or memorandum of agreement contains or relates to several distinct matters it is chargeable with duty as if each of such matters were contained in a separate instrument; and if it is made for any consideration in respect of which it is chargeable with *ad valorem* duty (*o*), and also for any further or other valuable consideration, it is chargeable with duty, as if there were separate instruments, in respect of each of the considerations (*p*).

If an agreement or memorandum relates substantially to only one transaction, or one subject-matter, it only requires one stamp, even though there may be several parties, each of whom undertakes a separate liability, or contracts with reference to his own interest only, provided they all have a common interest in the subject-matter of the agreement (*q*). If, on the other hand, an instrument relates

(*i*) See note (*m*), p. 530, *ante*.

(*j*) *Rex* v. *Castle Morton* (*Inhabitants*) (1820), 3 B. & Ald. 588; and see *Rankin* v. *Hamilton* (1850), 15 Q. B. 187; *Crowther* v. *Solomons* (1848), 6 C. B. 758.

(*k*) *Marine Investment Co.* v. *Haviside* (1872), L. R. 5 H. L. 624; *Crisp* v. *Anderson* (1815), 1 Stark. 35.

(*l*) *Marine Investment Co.* v. *Haviside*, *supra*; *Crowther* v. *Solomons* (1848), 6 C. B. 758.

(*m*) R. S. C., Ord. 39, r. 8; *Blewitt* v. *Tritton*, [1892] 2 Q. B. 327, C. A.; *Mander* v. *Ridgway*, [1898] 1 Q. B. 501 (county court judge).

(*n*) *Lowe* v. *Dorling* (1905), 74 L. J. (K. B.) 794 (county court action).

(*o*) See p. 533, *post*.

(*p*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 4.

(*q*) *Goodson* v. *Forbes* (1815), 6 Taunt. 171 (agreement by several underwriters for a reference to arbitration of a claim under one policy); *R.* v. *Louth* (*Inhabitants*) (1828), 8 B. & C. 247 (indenture of apprenticeship for seven years, the apprentice to serve A. for the first four, and his own father for the remaining three years in different trades: held, one stamp sufficient); *Price* v. *Thomas* (1831), 2 B. & Ad. 218 (surety joining with tenant in covenant for payment of rent); *Cook* v. *Jones* (1812), 15 East, 237 (one annuity granted by three persons); *Bowen* v. *Ashley* (1805), 1 Bos. & P. (N. R.) 274 (bond containing a condition for performance by each obligor of the same matters, with separate penalties); *Davis* v. *Williams* (1811), 13 East, 232 (agreement by several to subscribe to one common fund); *Ramsbottom* v. *Davis* (1839), 4 M. & W. 584 (guarantee by three persons to pay £50 each in consideration of the discharge of one debt); *Wills* v. *Bridge* (1849), 4 Exch. 193 (transfer by several of their separate interests in certain shares); *Doe* d. *Croft* v. *Tidbury* (1854), 14 C. B. 304; *Shipton* v. *Thornton* (1838), 9 Ad. & El. 314 (agreement by a partner to

SECT. 1. In General.

to several distinct transactions, or matters of agreement, even though between the same parties, it must bear as many stamps as there are transactions or matters of agreement (*r*).

Restamping.

1066. Where an agreement is materially altered by consent of the parties after having been completed and taken effect as a contract, it must be restamped as a new agreement (*s*), except where the alteration is a mere correction of a mistake and carries out the original intention of the parties (*t*). But restamping is not required where an alteration is made before the agreement has been completely executed and taken effect (*a*), nor where the alteration does not affect the obligations of the parties, and is therefore immaterial (*b*).

SECT. 2.—*Agreements specifically charged.*

Duty specifically charged.

1067. The following agreements, which are treated of under other titles of this work, are specifically charged with duty (*c*) :—

Agreement for a lease or tack or for any letting (*d*); agreement pursuant to the Highway Acts relating to making, maintaining, or repairing of highways (*e*); instrument of apprenticeship (*f*); articles

pay freight in respect of goods of his own and also goods belonging to the firm without distinguishing between his own and the firm's goods).

(*r*) *Roots* v. *Dormer* (*Lord*) (1832), 4 B. & Ad. 77 (where one person buys several different lots at a sale of land by auction, each lot forms the subject of a distinct contract); *Wharton* v. *Walton* (1845), 7 Q. B. 474 (agreement to take a publichouse. A., who was not named as a party to the agreement, guaranteed payment by the tenant of certain penalties by signing a separate agreement written on the same document. It was held that an agreement stamp in respect of the guarantee, as well as a lease stamp, was necessary; compare *Price* v. *Thomas* (1831), 2 B. & Ad. 218. And see *Nicholson* v. *Smith* (1822), 3 Stark. 128; *Stone* v. *Metcalf* (1815), 1 Stark. 53.

(*s*) *Robson* v. *Hall* (1792), Peake, 172; *Reed* v. *Deere* (1827), 7 B. & C. 261 (two agreements, the second varying the first; both must be stamped); *Bacon* v. *Simpson* (1837), 3 M. & W. 78 (indorsement enlarging time for performance of the agreement; new stamp necessary); *Stephens* v. *Lowe* (1832), 9 Bing. 32 (indorsement on bond altering the time for an arbitration; agreement stamp necessary); *Bowman* v. *Nichol* (1794), 5 Term Rep. 537; *Cardwell* v. *Martin* (1808), 9 East, 190; *Sutton* v. *Toomer* (1827), 7 B. & C. 416 (alteration in rate of interest); *Knill* v. *Williams* (1809), 10 East, 431; *Hill* v. *Patten* (1807), 8 East, 373 (policy on ship and outfit altered to ship and goods after commencement of risk); *French* v. *Patton* (1808), 9 East, 351.

(*t*) *Jacob* v. *Hart* (1817), 6 M. & S. 142; *Byrom* v. *Thompson* (1839), 11 Ad. & El. 31; *Robinson* v. *Touray* (1813), 1 M. & S. 217 (ship described by wrong name in policy); *Sawtell* v. *Loudon* (1814), 5 Taunt. 359 (policy taken on goods instead of ship by mistake).

(*a*) *Jones* v. *Jones* (1833), 1 Cr. & M. 721; *Spicer* v. *Burgess* (1834), 1 Cr. M. & R. 129; *Matson* v. *Booth* (1816), 5 M. & S. 223; *Downes* v. *Richardson* (1822), 5 B. & Ald. 674.

(*b*) *Jacob* v. *Hart* (1817), 6 M. & S. 142; *Walter* v. *Cubley* (1833), 2 Cr. & M. 151.

(*c*) By the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1 and Schedule, except where otherwise mentioned. Where an instrument is chargeable under two or more different categories, it must be stamped with the higher or highest duty (*Speyer Brothers* v. *Inland Revenue Commissioners*, [1908] A. C. 92).

(*d*) See title LANDLORD AND TENANT.

(*e*) See *Southampton County Council* v. *Inland Revenue Commissioners* (1905), 92 L. T. 364; *Cumberland County Council* v. *Inland Revenue Commissioners* (1898), 78 L. T. 679. The duty in this case is sixpence.

(*f*) See titles INFANTS AND CHILDREN; MASTER AND SERVANT.

SECT. 2. Agreements specifically charged.

of clerkship (*g*); bank note (*h*); bill of exchange, promissory note, and cheque (*i*); bill of lading (*k*); bill of sale (*l*); bond (*m*); charter-party (*k*); contract note for or relating to the sale or purchase of stock or of any marketable security (*n*); covenant for securing the payment or repayment of money, or the transfer or retransfer of stock (*o*); covenant in relation to any annuity or to other periodical payments (*p*); separate deed of covenant on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of, or the title to, the property sold or mortgaged, or to the production of the muniments of title relating thereto, or to all or any of such matters (*q*); letter of allotment or renunciation (*r*); policy of sea, life, or accident insurance, or insurance by way of indemnity against loss of or damage to property (*s*); settlement (*t*).

Security for periodical payments.

1068. An agreement which is the only or principal or primary security for any annuity, or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack; or which is a collateral or auxiliary or additional or substituted security for any of such purposes where the principal or primary instrument is duly stamped; or which is a contract for payment of a superannuation annuity, *i.e.*, a deferred life annuity granted or secured to any person in consideration of annual premiums payable until he attains a specified age, and so as to commence on his attaining that age, is chargeable with the same *ad valorem* duty, although it is only an agreement under hand, as if it were a bond or other instrument under seal given as security for any of such purposes (*a*).

(*g*) See title SOLICITORS.

(*h*) See title BANKERS AND BANKING, Vol. I., p. 573.

(*i*) See title BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS, Vol. II., p. 570.

(*k*) See title SHIPPING AND NAVIGATION.

(*l*) See title BILLS OF SALE, Vol. III., p. 76.

(*m*) See title BONDS, Vol. III., p. 103; reference may be made to *Durham Electrical etc. Co.* v. *Inland Revenue Commissioners* (1909), 25 T. L. R. 348.

(*n*) The duty is one penny in the case of the value being more than £5 and less than £100, and one shilling where the value is £100 or more. "Contract note" is defined as the note sent by a broker or agent to his principal (except where such principal is acting as broker or agent for a principal) advising him of the sale or purchase of any stock or marketable security, and where a note advises the sale or purchase of more than one description of stock or marketable security, it is for the purpose of stamp duty deemed to be as many contract notes as there are descriptions of stock or security sold or purchased (Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 52 and Schedule; Customs and Inland Revenue Act, 1893 (56 Vict. c. 7, s. 3). As to the penalty for omitting to send a duly stamped contract note, see Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 52, 53 (3); Revenue Act, 1898 (61 & 62 Vict. c. 46), s. 7 (1).

(*o*) See title MORTGAGE.

(*p*) See title RENT-CHARGES AND ANNUITIES.

(*q*) See titles MORTGAGE; SALE OF LAND.

(*r*) See title COMPANIES, Vol. V.

(*s*) See title INSURANCE.

(*t*) See title SETTLEMENTS.

(*a*) *Sweetmeat Automatic Delivery Co.* v. *Inland Revenue Commissioners*, [1895] 1 Q. B. 484 (agreement for placing automatic machines at railway stations at a yearly rent, payable quarterly, determinable by three months' notice); *National*

SECT. 2. Agreements specifically charged.

Sale of property.

1069. Any contract or agreement, whether under seal or under hand only, made in the United Kingdom (*b*), for the sale of any equitable estate or interest in any property whatsoever (*c*), or for the sale of any estate or interest in any property (*d*) except lands, tenements or hereditaments, or property locally situated out of the United Kingdom (*e*), or goods, wares, or merchandise, or stock or marketable securities, or any ship or vessel or part, interest, or share of or in any ship or vessel, is chargeable with the same *ad valorem* duty, to be paid by the purchaser, as if it were a conveyance on sale of the estate, interest, or property contracted or agreed to

Telephone Co. v. *Inland Revenue Commissioners*, [1900] A. C. 1 (agreement under hand only for rental of private telephone wire and apparatus for a yearly sum payable in advance, determinable by three months' notice); *Lewis* v. *Inland Revenue Commissioners*, [1898] 2 Q. B. 290 (separation deed between husband and wife, providing for the payment of an annuity to the wife by quarterly payments). As to the amount of the duty payable, see title BONDS, Vol. III., p. 103. Where the instrument contemplates weekly or other periodical payments for an indefinite period, the amount of the weekly or other periodical payment is the sum periodically payable on which the amount of duty is to be assessed, and not the aggregate of the periodical payments during the year (*Clifford* v. *Inland Revenue Commissioners*, [1896] 2 Q. B. 187; *Jackson* v. *Inland Revenue Commissioners* (1902), 87 L. T. 269). As to the stamping of such agreements after execution, see s. 15 (2) of the Stamp Act, 1891 (54 & 55 Vict. c. 39); and as to instruments providing for payment by instalments which are otherwise charged with *ad valorem* duty in respect of the sum so payable, see *Limmer Asphalte Paving Co.* v. *Inland Revenue Commissioners* (1872), L. R. 7 Exch. 211.

(*b*) An agreement is made in the United Kingdom within the meaning of the Act if it is executed in the United Kingdom by a party whose execution is necessary to make it complete and perfect (*Inland Revenue Commissioners* v. *Muller & Co.'s Margarine*, [1901] A. C. 217).

(*c*) *E.g.*, the equity of redemption of land in a colony (*Farmer & Co.* v. *Inland Revenue Commissioners*, [1898] 2 K. B. 141), or the benefit of a contract to provide land for a factory abroad (*Danubian Sugar Factories* v. *Inland Revenue Commissioners*, [1901] 1 K. B. 245), or a patent registered in a colony (*Smelting Co. of Australia* v. *Inland Revenue Commissioners*, [1897] 1 Q. B. 175, C. A.). But a contract for the sale of a lease which provides that, in the event of the landlord refusing his consent to an assignment, the purchaser shall have the option of calling for a declaration of trust, is a contract for the sale of the legal interest, and not for the sale of an equitable estate or interest, even though a declaration of trust may in fact be executed, the purchaser not being under any obligation under the contract to accept such a declaration (*West London Syndicate* v. *Inland Revenue Commissioners*, [1898] 2 Q. B. 507, C. A.).

(*d*) On the sale of a business as a going concern, including book debts to be taken as at the end of the preceding year, it was held that the book debts were property on the consideration for which *ad valorem* duty was payable, although the debts had for the most part been paid before the date of the agreement, and wholly paid before completion (*Measures Brothers* v. *Inland Revenue Commissioners* (1900), 82 L. T. 689). And see as to the meaning of property the cases cited in the preceding note.

(*e*) A patent registered in a colony, and the sole licence to use it in a district of the colony, are not locally situated out of the United Kingdom within the Act (*Smelting Co. of Australia* v. *Inland Revenue Commissioners*, [1897] 1 Q. B. 175, C. A.), nor is the benefit of a contract to provide land for a factory abroad (*Danubian Sugar Factories* v. *Inland Revenue Commissioners*, [1901] 1 K. B. 245). But the goodwill of a business abroad, all the customers of which are resident abroad, is property locally situated out of the United Kingdom (*Inland Revenue Commissioners* v. *Muller & Co.'s Margarine*, [1901] A. C. 217).

be sold (*f*), provided that where any such contract or agreement is stamped with the fixed duty of ten shillings if under seal, or sixpence if under hand only, it is regarded as duly stamped for the mere purpose of proceedings to enforce specific performance or to recover damages for the breach thereof (*g*).

SECT. 2. Agreements specifically charged.

Where a purchaser who has paid the *ad valorem* duty on any such contract or agreement enters into a contract for the sale of the property before having obtained a conveyance or transfer thereof, such contract, if the consideration is in excess of the consideration for the original sale, is chargeable with *ad valorem* duty in respect of the excess, and otherwise is chargeable with the fixed duty of ten shillings or of sixpence, according to whether it is under seal or under hand only (*h*).

SECT. 3.—*What Documents require Stamps.*

1070. It is not necessary, in order to render a document liable to stamp duty as a memorandum of an agreement, that it should contain all the terms of the contract between the parties, or that it should be a sufficient memorandum to satisfy the provisions of the Statute of Frauds (*i*); it is enough that it contains evidence of some of the terms, provided that it is intended as a record of the agreement of those terms binding both of the parties (*i*).

Documents requiring stamps.

But a document is not liable to the duty unless it is evidence of an agreement between the parties. Thus, a written proposal,

(*f*) The Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 59 (1). The duty on a conveyance on sale is as follows:—

Where the amount or value of the consideration for the	£	s.	d.
sale does not exceed £5	0	0	6
Exceeds £5 and does not exceed £10	0	1	0
,, £10 ,, £15	0	1	6
,, £15 ,, £20	0	2	0
,, £20 ,, £25	0	2	6
,, £25 ,, £50	0	5	0
,, £50 ,, £75	0	7	6
,, £75 ,, £100	0	10	0
,, £100 ,, £125	0	12	6
,, £125 ,, £150	0	15	0
,, £150 ,, £175	0	17	6
,, £175 ,, £200	1	0	0
,, £200 ,, £225	1	2	6
,, £225 ,, £250	1	5	0
,, £250 ,, £275	1	7	6
,, £275 ,, £300	1	10	0
,, £300 For every £50, and also for any fractional part of £50	0	5	0

Where duty has been duly paid on the agreement no further duty is payable on the conveyance or transfer of the property (*ibid.*, s. 59 (3), (5)), and the duty is returnable if the agreement is afterwards rescinded or annulled, or for any other reason is not substantially carried out (*ibid.*, s. 59 (6)).

(*g*) *Ibid.*, s. 59 (4).

(*h*) *Ibid.*, s. 59 (2).

(*i*) 29 Car. 2, c. 3; and see *Ramsbottom* v. *Mortley* (1814), 2 M. & S. 445 (written memorandum delivered by auctioneer to bidder to whom lands were let by auction containing a description of the lands, the rent payable, and the term for which they were let); *Glover* v. *Halkett* (1857), 2 H. & N. 487 (guarantee for rent not stating the consideration).

SECT. 3. What Documents require Stamps.

containing the terms on which a person is willing to contract, which must be accepted either by words or acts in order to constitute an agreement, does not require a stamp; and if such a proposal is accepted orally, or by doing the acts necessary to complete the contract, without any written assent, no stamp duty is payable (*k*). A written acceptance of an offer with variations is for this purpose a mere proposal (*l*).

On the other hand, if an oral proposal is accepted in writing, the written acceptance, being evidence of the agreement, must be stamped (*m*). The same rule applies to a draft agreement which is orally assented to but not executed (*n*), and where an oral agreement is made with reference to the terms of a written document, and so as to incorporate those terms, the document is not admissible in evidence, and consequently the agreement cannot be proved, unless the document is stamped (*o*). But if a written agreement refers to some other document so that the two documents form only one contract, it is sufficient if one of the documents is stamped (*p*), and an unstamped agreement, the provisions of which are incorporated in another agreement duly stamped, is admissible as evidence of the terms of the latter agreement (*q*).

An instrument is not chargeable with duty as an agreement unless it is binding either as an agreement or evidence of an agreement on both parties (*r*): nor is a memorandum which is merely

(*k*) *Hudspeth* v. *Yarnold* (1850), 9 C. B. 625 (written proposal for engagement of actor at a certain salary); *Drant* v. *Brown* (1825), 3 B. & C. 665 (written offer verbally accepted); *Edgar* v. *Blick* (1816), 1 Stark. 464 (prospectus containing terms on which a person was willing to be employed; employment by parol on terms of prospectus); *Vollans* v. *Fletcher* (1847), 1 Exch. 20; *Willey* v. *Parratt* (1848), 3 Exch. 211; *Bethell* v. *Blencowe* (1841), 3 Scott (N. R.), 568 (memorandum in course of negotiations for a tenancy arranged orally, that the landlord was willing that the proposed tenant should leave in certain events: held, a mere proposal in regard to one point under discussion, and no stamp requisite); *Ward* v. *Londesborough* (1852), 12 C. B. 252; *Mowatt* v. *Londesborough* (*Lord*) (1854), 3 E. & B. 307; *Clay* v. *Crofts* (1851), 20 L. J. (EX.) 361 (prospectus from schoolmaster stating the terms on which he was willing to receive pupils; compare *Williams* v. *Stoughton* (1817), 2 Stark. 292); *Doe* d. *Bingham* v. *Cartwright* (1820), 3 B. & Ald. 326; *Hawkins* v. *Warre* (1825), 3 B. & C. 690; *Walker* v. *Rostron* (1842), 9 M. & W. 411; *Remon* v. *Hayward* (1835), 2 Ad. & El. 666.

(*l*) *Vollans* v. *Fletcher*, *supra*; *Willey* v. *Parratt*, *supra*; *Moore* v. *Garwood* (1849), 4 Exch. 681, Ex. Ch. (where a defendant refused to produce the original offer after notice, and the plaintiff produced a written acceptance containing various provisions, it was held that the documents could not be presumed to be *ad idem*, and therefore the acceptance was admissible without a stamp).

(*m*) *Hegarty* v. *Milne* (1854), 14 C. B. 627; *Williams* v. *Stoughton* (1817), 2 Stark. 292 (schoolmaster's prospectus sent to father containing the terms on which his son had been accepted at the school); compare *Clay* v. *Crofts*, *supra*, note (*k*).

(*n*) *Chadwick* v. *Clarke* (1845), 1 C. B. 700.

(*o*) *Turner* v. *Power* (1828), 7 B. & C. 625 (parol agreement for a tenancy on the terms contained in a lease between other parties); and see *Alcock* v. *Delay* (1855), 4 E. & B. 660.

(*p*) *Peate* v. *Dicken* (1834), 1 Cr. M. & R. 422.

(*q*) *Pearce* v. *Cheslyn* (1835), 4 Ad. & El. 225.

(*r*) *Lucas* v. *Beach* (1840), 1 Scott (N. R.), 350 (minute of resolution of a company for acceptance of a tender); *Vaughton* v. *Brine* (1840), 1 Scott (N. R.), 258 (similar minute for appointment of clerk or secretary at a certain salary);

given as evidence of the performance or part-performance of a complete anterior oral agreement (*s*), or which is a mere recapitulation of a former agreement duly stamped (*t*).

Acknowledgment of debt.

1071. An I.O.U., or bare acknowledgment of a loan or of indebtedness, containing no provision as to payment or other evidence of the terms of an agreement, does not require any stamp (*a*), and the addition of the words "for value received" makes no difference in this respect (*b*). Even if an I.O.U. or acknowledgment contains a promise to pay interest at a specified rate, it does not require a stamp unless the value of the agreement for payment of interest is more than five pounds (*c*); but where the instrument specifies a day for payment or in other respects affords evidence of the terms of an agreement between the parties, it must be stamped as a promissory note or agreement, as the case may be (*d*).

Acknowledgment of deposit.

1072. Where a document contains no evidence of the terms of an express agreement, but merely of a fact from which an agreement is implied by law, as, for instance, a mere acknowledgment of the deposit of goods, from which a promise to redeliver on request is implied (*e*), or a mere direction or request to pay money from which the law implies a promise of reimbursement (*f*), it need not be stamped (*g*).

Bills and notes.

1073. If a bill of exchange or promissory note contains evidence of any agreement between the parties beyond the mere contract

Beeching v. *Westbrook* (1841), 8 M. & W. 411, *per* PARKE, B., and ALDERSON, B., at pp. 412, 413; *Blackwell* v. *M'Naughtan* (1841), 1 Q. B. 127.

(*s*) *De Porquet* v. *Page* (1850), 15 Q. B. 1073.

(*t*) *Marshall* v. *Powell* (1846), 9 Q. B. 779.

(*a*) *Fisher* v. *Leslie* (1795), 1 Esp. 426; *Payne* v. *Jenkins* (1830), 4 C. & P. 324; *Israel* v. *Israel* (1808), 1 Camp. 499; *Huxley* v. *O'Connor* (1837), 8 C. & P. 204, ("Mr. H. has advanced me £12 on furniture etc. delivered to him": held, no stamp requisite); *Wellard* v. *Moss* (1823), 1 Bing. 134; *Mullett* v. *Hutchison* (1828), 7 B. & C. 639; *Sibree* v. *Tripp* (1846), 15 M. & W. 23. In *Beeching* v. *Westbrook* (1841), 8 M. & W. 411, it was held that letters containing promises to remit money, and making excuses for not having done so, for the maintenance of an illegitimate child of the promisor, merely amounted to acknowledgments of indebtedness and did not require stamping; see, however, as to the necessity of a receipt stamp in the case of an acknowledgment of the payment or receipt or deposit of money, p. 452, *ante*. In *Watkins* v. *Hewlett* (1819), 1 Brod. & Bing. 1, it was held that a receipt for a promissory note expressing an executory consideration (the maintenance of an illegitimate child) on which the money secured by the note was to be paid, was sufficiently stamped as a receipt.

(*b*) *Gould* v. *Coombs* (1845), 1 C. B. 543.

(*c*) *Melanotte* v. *Teasdale* (1844), 13 M. & W. 216. See p. 539, *post*.

(*d*) *Brooks* v. *Elkins* (1836), 2 M. & W. 74 (I.O.U. specifying a date for payment); compare *Hyne* v. *Dewdney* (1852), 21 L. J. (Q. B.) 278, where it was held that the words "borrowed this day of J. H. £100 for one or two months" were a mere acknowledgment, and that the document did not require stamping either as a promissory note or as an agreement.

(*e*) *Blackwell M'Naughtan* (1841), 1 Q. B. 127; and see *Langdon* v. *Wilson* (1828), 2 Man. & Ry. (K. B.) 10.

(*f*) *Parker* v. *Dubois* (1836), 1 M. & W. 30.

(*g*) *Notley* v. *Webb* (1848), 5 C. B. 834 (acknowledgment by A. that B. had accepted an accommodation bill for him and promise to provide for it: held, simply an acknowledgment from which the law would imply a promise to provide for the bill, and no stamp necessary).

SECT. 3. What Documents require Stamps.

for payment in accordance with the terms of the instrument, it must not only be stamped as a bill or note, but with an additional duty as an agreement (*h*); and any agreement indorsed on a bill or note enlarging the time for payment or otherwise altering the terms of the original contract requires an agreement stamp (*i*).

Securities.

1074. Any instrument under hand only (not being a promissory note or bill of exchange) given upon the occasion of the deposit of any share warrant or stock certificate to bearer, or foreign or colonial share certificate, or any security for money transferable by delivery, by way of security for any loan, or making redeemable or qualifying a duly stamped transfer, intended as a security, of any registered stock or marketable security, is chargeable with stamp duty as an agreement (*k*).

SECT. 4.—*Exemptions.*

Exemptions from duty.

1075. The following are exempt from duty:—

(1) Any agreement or memorandum the matter whereof is not of the value of five pounds.

(2) Any agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant (*l*).

(3) Any agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise.

(4) Any agreement or memorandum made between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in the United Kingdom.

(5) Any instrument for the sale, transfer, or other disposition either absolutely or by way of mortgage, or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel.

(6) Any instrument of apprenticeship, bond, contract or agreement entered into in the United Kingdom for or relating to the service in any of His Majesty's colonies or possessions abroad of any person as an artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry, or labourer (*m*).

(7) Any memorandum, such as an acknowledgment of a debt for the purpose of interrupting or defeating the operation of the Statutes of Limitation rendered necessary by Lord Tenterden's Act (*n*).

(*h*) *Nicholson* v. *Smith* (1822), 3 Stark. 128 (bill of exchange expressing the terms of an agreement between landlord and tenant); and see *Smith* v. *Nightingale* (1818), 2 Stark. 375.

(*i*) *Stone* v. *Metcalf* (1815), 1 Stark. 53.

(*k*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 23.

(*l*) In *Wilson* v. *Zulueta* (1849), 14 Q. B. 405, it was held that an agreement for the employment of firemen and stokers on board ship was within this exemption.

(*m*) The foregoing exemptions are contained in the schedule to the Stamp Act, 1891 (54 & 55 Vict. c. 39). There are a large number of exemptions under statutes relating to particular subjects other than stamp duties, as to which see the appropriate titles.

(*n*) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14); see s. 8; *Morris* v. *Dixon* (1836), 4 Ad. & El. 845 (although the acknowledgment contains an express promise to pay); *Taylor* v. *Steele* (1847), 16 M. & W. 665.

SECT. 4. Exemptions.

(8) Any instrument or document, except a mortgage, issued, given, or made by a registered building society under its rules or under the Building Societies Acts (*o*).

(9) Certain policies of insurance and other documents given by or in connection with registered friendly societies (*p*).

Computation of value.

1076. In ascertaining the value for the purpose of the exemption of any agreement or memorandum, the matter whereof is not of the value of five pounds, the matter to be valued is the obligation undertaken by the agreement, and not the property or thing which is the subject of the obligation (*q*). Thus, in the case of an agreement for warehousing goods the matter to be valued is the rent payable (*r*), and in the case of an agreement for the carriage of goods the amount of the carriage (*s*), and not in either case the value of the goods. So, if a person agrees to pay interest on a bill of exchange in the event of its not being paid at maturity, the question

(*o*) Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 41. See title BUILDING SOCIETIES, Vol. III., p. 372.

(*p*) Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 33. See title FRIENDLY SOCIETIES.

(*q*) *Pemberton* v. *Vaughan* (1847), 10 Q. B. 87 (agreement to give up premises and goodwill of business for £7, and not to open a shop of a similar kind in the neighbourhood under a penalty of £20: held, that the subject-matter of the agreement was not the penalty and that it was not of the value of £20). Under a former Stamp Act, imposing a duty on every agreement where the matter thereof should be of the value of £20, it was held that in order to be liable to duty it must appear affirmatively that the matter of the agreement was of that value (*Feltham* v. *Cartwright* (1839), 7 Scott, 695; *R.* v. *Enderby* (*Inhabitants*) (1831), 2 B. & Ad. 205; *Semple* v. *Steinau* (1853), 8 Exch. 622; *Wrigley* v. *Smith* (1834), 5 B. & Ad. 1117); that it was not sufficient that it might ultimately turn out to be of that value unless it was so in its nature and inception (*Melanotte* v. *Teasdale* (1844), 13 M. & W. 216; *Liddiard* v. *Gale* (1850), 4 Exch. 816 (agreement for work to be done at a certain price per rod: held, that as it did not appear at the time of the contract that the work would amount to £20, no stamp was necessary, although in the result it exceeded that sum); *Cox* v. *Bailey* (1843), 6 Man. & G. 193 (indemnity given on the withdrawal of a distress for rent amounting to 24*s.*: held, no stamp required though the sum sought to be recovered under the agreement exceeded £20); *Lloyd* v. *Mansell* (1850), 1 L. M. & P. 130 (reference to arbitration of all matters in dispute); *Browne* v. *Dawson* (1840), 12 Ad. & El. 624 (rules for the government of a school providing the terms of the master's office, signed by the master and trustees of the school); and also that the onus was on the party objecting to the want of a stamp of proving the value of the agreement (*Hill* v. *Ramm* (1843), 5 Man. & G. 789). It was held, further, that the agreement must be one the value of which was capable at the time of being estimated and ascertained (*Liddiard* v. *Gale*, *supra*; *Orford* v. *Cole* (1818), 2 Stark. 351 (promise of marriage held not to require any stamp). It is, however, very questionable to what extent, if at all, these cases are to be relied on as authorities for the construction of the exemption under consideration. Under the former statute only agreements of a certain value were rendered liable to duty, whereas under the Stamp Act, 1891 (54 & 55 Vict. c. 39), all agreements are rendered so liable, except those expressly exempted, and on principle the burden would seem to be on the person alleging that an agreement falls within the exemption of proving it.

(*r*) *Baldwin* v. *Alsager* (1844), 13 M. & W. 365. And see *Chadwick* v. *Sills* (1823), Ry. & M. 15, where it was held in the case of a memorandum of the receipt of goods by a wharfinger, that the wharfage to be paid was the matter to be valued and not the value of the goods.

(*s*) *Latham* v. *Rutley* (1823), Ry. & M. 13.

SECT. 4. Exemptions.

whether duty is payable depends on the value of the agreement to pay interest, and not on the amount of the bill (*t*); and similarly if a debtor acknowledges a debt and undertakes to pay interest thereon at a specified rate until it is paid (*a*). Where, in consideration of the withdrawal of a distress for rent, the tenant signed a memorandum admitting the amount due and declaring that in default of payment by a certain day the landlord should be entitled to make a second entry for the purpose of distraining, it was held that the matter to be valued was the indemnity against an action for a second entry, neither the amount of the rent nor the value of the goods being material (*b*).

Sale of goods.

1077. The exemption of agreements and memoranda relating to the sale of goods extends not only to agreements for the sale of goods and memoranda of such agreements (*c*), but also to collateral agreements connected with a sale of goods, as, for instance, a continuing guarantee for the price of goods to be supplied to a third person (*d*); an agreement by a broker to indemnify his principal against a loss on the resale of goods bought on his behalf (*e*); an agreement by a person who has bought goods to give another person a half-share in the property bought (*f*); an agreement to share profit or loss in respect of goods bought by one person for the joint account of himself and the person entering into the agreement (*g*); a guarantee in consideration of goods being assigned to a third person of the sale thereof and payment of the price (*h*); or an agreement cancelling a contract for the sale of goods (*i*). The exemption is to be construed liberally in favour of the subject, and extends to agreements for the sale of future goods, and any agreement which in the ordinary course of events would ultimately relate to the sale of goods (*k*), and also to agreements for the sale of goods which contain stipulations as to other matters incidental thereto (*l*).

(*t*) *Semple* v. *Steinau* (1853), 8 Exch. 622.

(*a*) *Taylor* v. *Steele* (1847), 16 M. & W. 665; *Melanotte* v. *Teasdale* (1844), 13 M. & W. 216.

(*b*) *Hill* v. *Ramm* (1843), 5 Man. & G. 789.

(*c*) See *Gurr* v. *Scudds* (1855), 11 Exch. 190; *Chatfield* v. *Cox* (1852), 21 L. J. (Q. B.) 279 (agreement for goods to be supplied to a third person, the price to be set off against an existing debt owing by the seller to the buyer).

(*d*) *Martin* v. *Wright* (1845), 6 Q. B. 917; *Warrington* v. *Furbor* (1807), 8 East, 242; *Watkins* v. *Vince* (1818), 2 Stark. 368.

(*e*) *Curry* v. *Edensor* (1790), 3 Term Rep. 524.

(*f*) *Marson* v. *Short* (1835), 2 Scott, 243.

(*g*) *Venning* v. *Leckie* (1810), 13 East, 7.

(*h*) *Sadler* v. *Johnson* (1847), 16 M. & W. 775.

(*i*) *Whitworth* v. *Crockett* (1818), 2 Stark. 431.

(*k*) *Gurr* v. *Scudds* (1855), 11 Exch. 190, *per* POLLOCK, C.B.; *Sadler* v. *Johnson* (1847), 16 M. & W. 775, *per* PLATT, B., at p. 777; *Pinner* v. *Arnold* (1835), 2 Cr. M. & R. 613 (sale of press, to be ready for delivery in three months; price to be paid by instalments during the three months until delivery); *Hughes* v. *Breeds* (1826), 2 C. & P. 159 (sale of goods to be finished in workmanlike manner); *Wilks* v. *Atkinson* (1815), 6 Taunt. 11 (contract for sale and delivery of oil not then expressed from the seed); compare *Buxton* v. *Bedall* (1803), 3 East, 303.

(*l*) *Heron* v. *Granger* (1805), 5 Esp. 269.

SECT. 4. Exemptions.

But, in deciding whether an agreement is exempt from duty regard must be had to the primary object of the agreement. A letter from a principal to his factor inclosing bills drawn on the factor and promising to provide for them in the event of certain goods in the factor's hands remaining unsold at the maturity of the bills is not exempt as relating to the sale of the goods, the primary object being not the sale of the goods, but to obtain an advance on them (*m*); and an agreement for the sale of goodwill is not exempt from duty merely because it also relates to a sale of goods (*n*). An executory agreement for the manufacture and erection of machinery is not within the exemption (*o*).

Deeds.

The exemption from duty of agreements relating to the sale of goods does not extend to instruments under seal (*p*); nor to hire-purchase agreements, which are chargeable with the fixed duty of sixpence or ten shillings, according to whether they are under hand only or under seal (*q*).

(*m*) *Smith* v. *Cator* (1819), 2 B. & Ald. 778. Compare *Southgate* v. *Bohn* (1846), 16 M. & W. 34, where it was held that a memorandum of an advance by an auctioneer on goods which were sent for immediate sale in order to repay the advance was exempt because the sale of the goods was directly contemplated by the agreement.

(*n*) *South* v. *Finch* (1837), 4 Scott, 293.

(*o*) *Buxton* v. *Bedall* (1803), 3 East, 303 ; and see *Forsyth* v. *Jervis* (1816), 1 Stark. 437.

(*p*) *Clayton* v. *Burtenshaw* (1826), 5 B. & C. 41.

(*q*) Finance Act, 1907 (7 Edw. 7, c. 13), s. 7.

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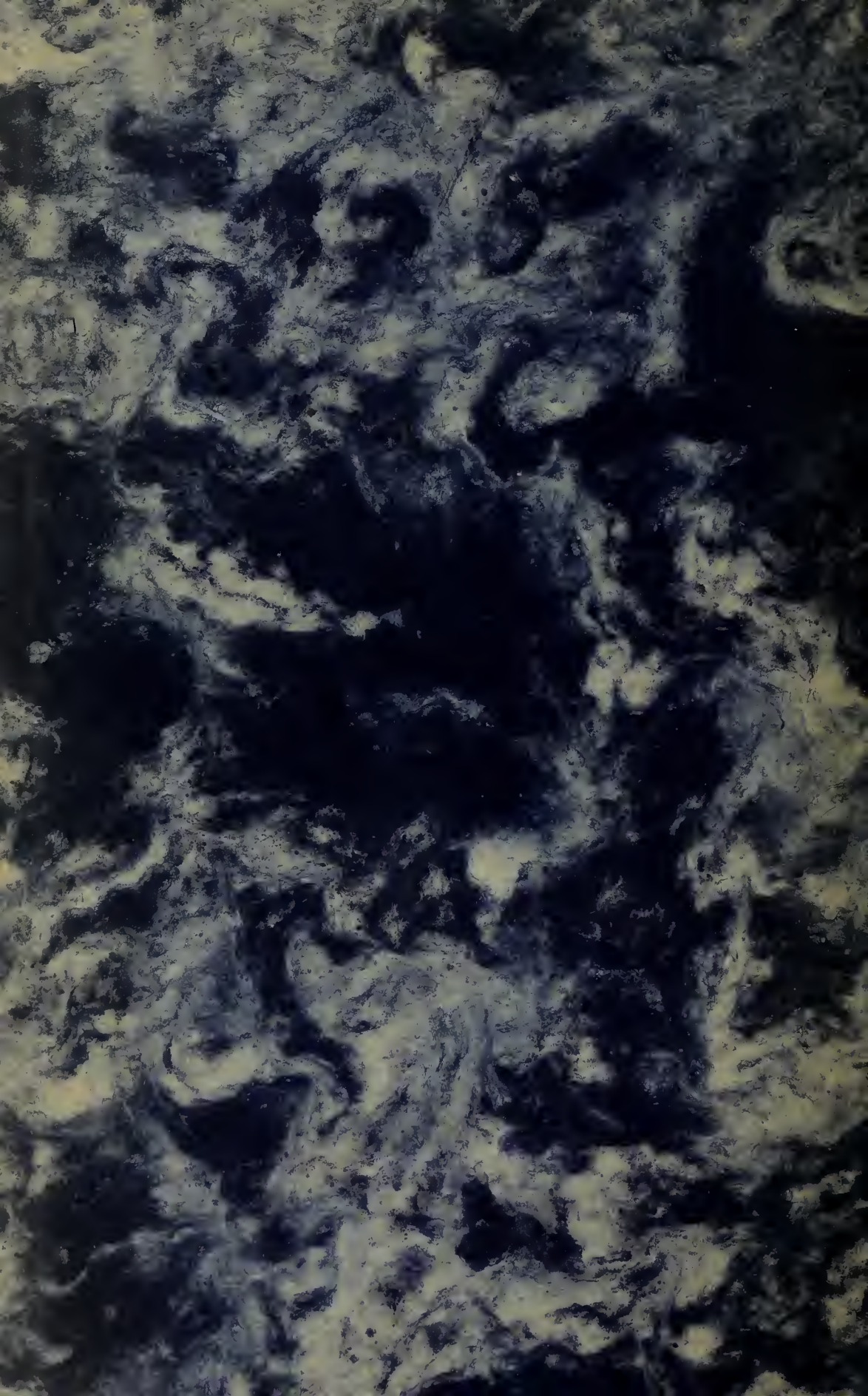
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